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BY
F. M. GOADBY, Esq., D.C.L.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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ON THE STATUALITY OF LAW.

[*Contributed by* PROFESSOR GIORGIO DEL VECCHIO, *Dean of the Faculty of Law, University of Rome.*]

The Problem of the Relations between Law and the State.—The disputes on the existence, or rather, the validity of natural law and its relationship to positive law being appeased, if not ended, no problem has attracted the theorists on law of to-day more than that of the relations between law and the State.[1] This directly concerns fundamental questions in several juridical fields and yet must in some way be solved in order that we may arrive at their sure systematization ; while it has likewise, in its general nature, a speculative importance, in so far as it touches the idea itself of "Law" : that idea which, notwithstanding the fatuous "negations" of the Philosophy of law, has always been and could not fail to be, the basis of Jurisprudence and an essential part of every Philosophy.

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[1] In this sense cf. Orlando, *Recenti indirizzi circa i rapporti fra diritto e stato* (in the *Rivista di Diritto Pubblico*, 1926, Pt. I, p. 273). Orlando considers the problem as it regards public law and examines in particular, among other things, the work of Romano, *L'Ordinamento Giuridico* (Pisa, 1918) ; on which cf. also Bonucci, *Ordinamento Giuridico e Stato* (in the *Rivista di Diritto Publico*, 1920, Pt. I) and our own note, *Moderne Concezioni del Diritto* (in the *Rivista Internazionale di Filosofia del Diritto*, A. I, Fasc. III). On the same problem see also for example Ehrlich, *Grundlegung der Soziologie des Rechts* (München, 1913), pp. 110 *et seq.* ; *Die juristische Logik* (Tübingen, 1918), pp. 81 *et seq.* ; Radbruch, *Grundzüge der Rechtsphilosophie* (Leipzig, 1914), pp. 83 *et seq.*; Hauriou, *La Théorie de l'Institution et de la Fondation* (in *La Cité Moderne et les Transformations du Droit*, Paris, 1925) ; Cammarata, *Contributi ad una Critica Gnoseologica della Giurisprudenza. Il Problema del Diritto in rapporto al concetto dello Stato* (Roma, 1925) ; *Il concetto del diritto e la pluralità degli ordinamenti giuridici* (Catania, 1926) ; Tatarin-Tarnheiden, *Staat und Recht in ihrem begrifflichen Verhältnis* (in *Festgabe für Stammler*, Berlin, 1929) ; Perticone, *Il Diritto e lo Stato* (in *Rivista Internazionale di Filosofia del Diritto*, A. IX, 192g (Fasc. III) ; Cesarini Sforza, *Il diritto dei privati* (in *Rivista Italiana per le scienze giuridiche*, N.S., A. IV, 1929, Fasc. I–II) ; Rovelli, *Su la statualità del Diritto e la distinzione fra diritto e morale* (in *Studi di diritto pubblico in onore di Ranelletti*, Vol. II, Padova, 1931) ; Panunzio, *La pluralità degli ordinamenti giuridici e l'unità dello Stato* (in *Studi filosofico-juridici*, Vol. II, Modena, 1931) ; Recasens Siches, *Estado y derecho ; el problema acerca de si son conceptos idénticos o diversos, ib.* ; Burckhardt, *L'Etat et le Droit* (in *Verhandlungen des Schweizerischen Juristenvereins*, II Heft, Basel, 1931) ; Schindler, *Recht und Staat, ib.* ; Curcio, *Stato e Diritto nella recentissima letteratura italiana* (in *Lo Stato*, A. II, 1931, Fasc. XI) ; C. Petrone, *Stato e Diritto* (Roma, 1932) ; R. Ravà, *La teoria della pluralità degli ordinamenti giuridici e le associazioni sindacali riconosciute* (Firenze, 1933).

The doctrine according to which the State, and the State alone, may determine law corresponds to the ordinary mental attitude of jurists whose first office is, precisely, to interpret the laws as an expression of the sovereignty of the State. All law would then be, by definition, " statual." This opinion tallies (while again representing a restriction) with that which declares all law to be " positive " ; and as already, for example, Bergbohm has maintained that this adjective, added to law, represents a mere pleonasm (being, in his opinion, law—positive law),[1] so, more recently, has come to be maintained, especially by Kelsen, not only the equation between law and statual law, but actually between law and State.[2]

None the less, on the part of students of positive law, as in general of the followers of the inductive method in the study of social life, notable observations in opposition to this opinion are not lacking.

Already in the proposal to inquire into the so-called " historical formation of law and of the State " a distinction has been introduced and has found confirmation in the results of the inquiry itself ; insomuch that the data collected have seemed sufficient to conclude that, while law is contemporary with man (since human life does not exist and is not possible except in a society which, in its turn, is not possible without connexions and juridical limitations among those who compose it), the State, on the contrary, arises only in virtue of a long process ; that is, when the synthesis of the single clans is achieved in a new and ampler " super-clan " unity. Law would exist therefore, even as an historical and positive phenomenon, before the State.[3]

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[1] Bergbohm, *Jurisprudenz und Rechtsphilosophie* (Leipzig, 1892), p. 49.

[2] V. Kelsen, *Hauptprobleme der Staatrechtslehre* (Tübingen, 1911), pp. 405 *et seq.* ; *Das Verhältnis von Staat und Recht im Lichte der Erkenntniskritik* (Wien, 1921) ; *Der soziologische und der juristiche Staatsbegriff* (Tübingen, 1922 ; this comprises substantially the preceding) ; and other writings of this author and his school, many of them published in the *Zeitschrift für öffentliches Recht*, directed by Kelsen himself. Cf. the note of Condorelli, *Il rapporto fra Stato e Diritto secondo il Kelsen* (in the *Rivista Internazionale di Filosofia del Diritto*, A. III, 1923, Fasc. III).

[3] Cf. for examples in this connexion : Maine, *Ancient Law* (London, 1861, 16th ed., 1897), esp. pp. 128, 134 ; *Lectures on the Early History of Institutions* (London, 1875), p. 386 ; *Dissertations on Early Law and Custom* (new impr., London, 1901), Chap. VII, etc. ; Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, I Th.* (5. Aufl., Leipzig, 1891), pp. 176 *et seq.*, 183 *et seq.* ; Fustel de Coulanges, *La Cité Antique* (20th ed., Paris, 1908), L. II, Cc. VIII and X ;

Considering only the facts of the present phase, we cannot get away from the existence of at least two great systems—the law of the Church and International Law—to which a State does not properly correspond. We might well discuss (and it has been discussed) the nature of these different systems; according to some they would not really have a juridical nature, or they would have it only partially, just because certain characters which are found fully developed in State law are lacking in them. But it is clear that we risk getting into a circle, or a *petitio principii*, simply taking for granted what we ought to demonstrate.

Finally, we have to examine another order of phenomena, which equally seem to be a proof of the possibility of a law which is not State law; viz. a whole series of minor juridical orders established in the ambit of the State, but independent of it and even, in some cases, in opposition to it. The ancient corporations or Genossenschaften (particularly illustrated by Gierke) offer us typical examples of this species; but analogous phenomena may

L. III, C. III; Post, *Die Anfänge des Staats- und Rechtslebens* (Oldenburg, 1878), esp. pp. 103 *et seq.* (where the history of the constitutional law of all peoples is clearly divided into two periods: the "friedensgenossenschaftliche"—which comprises the "geschlechtsgenossenschaftliche"—and the "staatliche Periode"); *Giurisprudenza etnologica* (ed. it. Milano, 1906–8), esp. Vol. I, pp. 387, 401; L. H. Morgan, *Ancient Society* (New York, 1878; the divergences of the doctrines of this author, compared with, *e.g.*, those of Maine, are of a secondary nature with regard to the point in question); Gumplowicz, *Der Rassenkampf* (Innsbruck, 1883), pp. 181 *et seq.*; Posada, *Théories Modernes sur les Origines de la Famille, de la Société et de l'Etat* (Paris, 1896); Wilutzsky, *Vorgeschichte des Rechts*, esp. III T. (Berlin, 1903); MacLeod, *The Origins and History of Politics* (New York, 1931), esp. C. II ("How peoples can live without the State"), etc. Vanni, indeed, considers in general the formation of law to be "parallel with the formation of the State" (*Gli studi di H. S. Maine e le dottrine della Filosofia del Diritto*, Verona, 1892, p. 5; cf. pp. 63–66); but none the less rejects the theory by which "it would seem that law could not have existed before the State." "Even before," he observes, "any religious or political authority was constituted, there was an obligatory standard of conduct in the form of vague custom, and *before there was a State*, a special organ of Law, there was Justice, also vague and undifferentiated." "Before there was a state there were other forms of human association" (*Lezioni di Filosofia del Diritto*, 4th ed., Bologna, 1920, pp. 163 and 168). More explicit in this sense is, for example, Kohler: "Das Recht besteht vor jeder staatlichen Organisation, vor jedem Gericht, vor jeder executorischen Veranstaltung: es besteht im Herzen des Volkes als das Gefühl des Seinsollenden und Nichtseinsollenden. Daher gibt es kein Volk, ohne Recht: es gibt Völker ohne Gerichte, es gibt Völker bei welchen die staatliche Organisation fehlt oder nur in ihren äussersten Rudimenten entwickelt ist—aber ein Volk ohne Recht gibt es nicht: der Mensch kann niemals Nichtmensch sein" ("Ueber das Recht der Australneger," in *Zeitschrift für vergleichende Rechtswiss.*, VII Bd., 1887, pp. 323 *et seq.*). By another road similar conclusions are arrived at by Stammler, who conceives the State as a sub-species of the juridical order (*Das Recht im staatlosen Gebiete*, Leipzig, 1911, pp. 339 *et seq.*; *Theorie der Rechtswissenschaft*, 2. Aufl., Halle, 1923, pp. 239 *et seq.*). Cf. also the doctrine of Duguit, be met with in all stages, not excluding our own, of juridical evolution. Every time a society, by spontaneous efforts, tends to form itself, it tends to form within itself a law, or a complex of obligatory rules among its members ; and to refer such a law to the State, when even the birth of this was still unknown, appears to be a vain artifice. More than an artifice, it seems to be a logical impossibility when societies and their orders are directly turned against the State, so that they formally represent a violation of the regulations issued by it. It is easy then, to qualify such organizations as "anti-juridical" ; and so without doubt they are, if the law of the State is accepted as the starting-point. But if we set this aside and consider those organizations in themselves, it seems hard to deny that the complex of rules in force among them has altogether, or in part, a juridical character.

From these observations, even leaving apart all considerations of ideal or non-positive law, it seems that we must conclude that State law is to be distinguished from non-State law ; and that the

according to which every society has its own objective law even if that political differentiation which constitutes the State is lacking (*L'état, le droit objectif et la loi positive*, Paris, 1901 ; *Traité de droit constitutionnel*, 2nd ed., T. I, Paris, 1921, pp. 393 *et seq.*).

According to Gierke, on the contrary, the State and law arrive at the same time and are presupposed reciprocally, as two functions of social life (*Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien*, Tübingen, 1874, p. 27) ; but law may be generated also by associations separate from the State (*ib.*, p. 28 ; *Das Wesen der menschlichen Verbände*, Leipzig, 1902, p. 32, etc.). Such is also the opinion of Jellinek (*Allgemeine Staatslehre*, 3. Aufl. Neudr., Berlin, 1921, pp. 364 *et seq.* ; Ital. ed. Milano, 1921, pp. 652 *et seq.*). There are those who, affirming the political character of the primitive family and clan organizations, even among the above-quoted writers, partly approach this conception. For Jhering, *e.g.*, the archaic family represents a "Surrogate *des Staats*" ; and the *clan* "die Identität der Familie und des Staats" (*op. cit.*, I T., pp. 179, 184). Even more decidedly does Bonfante express himself in this sense ("*La gens e la familia* ; teorie vecchie e nuove sulle formazioni sociali primitive," in *Scritti giuridici varii*, I. Torino, 1916). He considers primitive social groups as "political organisms" while preserving the name of "State" for the unitary political organization (*loc. cit.*, p. 32). Someone has gone as far as to maintain that "The very first state which ever existed was a human family, consisting of a mother and her offspring. . . . The family is a State and the earliest form of State" (W. Donisthorpe, *Individualism—a System of Politics* (London, 1889, p. 2)). Cf. MacKechnie, *The State and the Individual* (Glasgow, 1896), p. 55.

For other considerations, in various senses, of the subject, cf. also : Spencer, *Principii di Sociologia* (It. ed., Torino, 1881–1899), esp. P. II, par. 257 *et seq.*, P. V, par. 441 *et seq.* ; Sidgwick, *The Development of European Polity* (London, 1903), pp. 44 *et seq.* ; Wundt, *Logik der Geistewissenschaften* ("Logik" III Bd., 4. Aufl., Stuttgart, 1921), pp. 579 *et seq.* ; Gény, *Science et technique en droit privé positif*, I (2nd ed., Paris, 1922), pp. 58 *et seq.* ; Vinogradoff, *Outlines of historical jurisprudence* (Oxford, 1920–1922), esp. Vol. I, pp. 84 *et seq.* ; Lowie, *The Origin of the State* (New York, 1927), esp. pp. 74 *et seq.*

first represents only a species, or a phase, perhaps the most important one, of the genus or logical category of law.

The Logical Essence of Law.—The problem, however, requires deep study. Before all else it is necessary, by calling attention briefly to somewhat elementary notions, to determine what really constitutes law. We recognize the essence of this concept in the inter-subjective or bilateral relationship, or in the co-ordination of the behaviour of several subjects, through which one of them can claim something (an action or omission) which is obligatory to the other. Whatever the content of such a claim may be, every time there is a correspondence between a demand on one hand and an obligation on the other, we are without doubt in the realm of law. We perceive from this, among other things, that a juridical proposition always implies as a *hypothesis* the determination of an obligation, which means an imperative.

From the purely logical point of view, consequently, possible juridical propositions are indefinitely numerous. We may, that is, suppose any correlation between subject and subject in the form we have seen, and at the same time, a possible will which affirms it, even if this will is not verified in the fact ; and multiply such suppositions indefinitely without leaving the logical sphere of law. If, for example, in place of the maxim actually in force with us : " any deed whatever which brings damage to others, obliges him, through whose fault it has happened, to make compensation for the damage," we formulate another hypothetically by which the obligation of compensation is affirmed to be equivalent to only the half of the damage, or to the double or triple amount of it, the juridical form still remains unchanged ; and the series of conceptual constructions of this type may be endlessly extended even when a positive juridical system fails to support them, and there is lacking the real will and persuasion of one who devises them by hypothesis.

Let us hasten to add, however, that in such matters the human mind cannot be fed on hypotheses alone. Every human subject, through an inner call, is drawn by necessity to co-ordinate with others in the form of law : that is, he derives from himself, even before he does from extraneous factors, a system of rules at least embryonic, for the mutual relations between himself and his fellows.

He has, in short, and gradually develops, a complex of sentiments and convictions as to the just and the unjust, to the lawful and the unlawful nature of each of them ; whence he affirms demands and claims on others, and, in his turn, recognizes himself to be subject to limitations and obligations towards them. These juridical valuations, upheld by the conscience and will of the subject, who in some measure enforces them, constitute the first source of positive and juridical order ; which results precisely from the confluence of the workings of individual consciences, while it influences them strongly in return.

The nexus of these reciprocal actions and reactions in the origins of positive law cannot be easily or briefly described. We shall endeavour here only to establish some fundamental notions.

The Process of its Historical Position.—Single juridical propositions, although they may be considered by themselves in abstract, naturally tend to constitute a system. The necessity of logical coherence leads to the systemization of those which are compatible or respectively complementary, and the elimination of those which are contradictory or incompatible. Will, which is living logic, cannot develop, even in the field of law, unless it links together its affirmations in such a way as to reduce them to a harmonious whole. Hence the perpetual labour (as Vico says), both of individual minds and of nations, to conciliate and develop in an organism the various juridical propositions, often discordant in their origin.

The moment in which a juridical idea becomes " positive " is not so easy to define as it would seem to non-jurists, or even to those dogmatic jurists who have their eyes fixed on law alone, as if it permitted no access to other sources and did not require, tacitly or expressly, concurrence of them for its own actuation.

This, in the meantime, is very certain : that the will of the single individual, who affirms a definite juridical rule, cannot suffice to render it positive. The positivity of the rule is constituted precisely by the fact that its effective vigour is made independent of the individual will, and, especially, of the will of one who might have an interest in violating it.

It is thus necessary for the existence of positive law, that a common or super-individual will should be constituted. What one might call disintegrated, or simply virtual, volitions, which appear in the juridical ideas as affirmed by anyone whatsoever, must give way to a constant and homogeneous will, capable of sustaining and imposing effectively a regulative system of social life.

This will, though in a certain sense a new and higher one, is nevertheless not radically different from that which belongs to single subjects. Each one of them may, and indeed must, by his nature, rise above the empirical ego in his conscience, recognize the subjectivity of others and regard himself from their point of view; thus he can and must conceive and will law as a transubjective and "meta-egoistic" commandment. The difference between this mode of placing law *in interiore homine*, as in a microcosm, and that in which it is offered to us fully developed in historical and social reality, is merely a difference of manner or, if you prefer it, of degree; not of substance. A confirmation of this is given us by the fact that the juridical determinations of the individual conscience coincide ordinarily, at least for the greater part, with those actually in force; and still further by the fact that an individual, possessing in himself an autonomous juridical sentiment, may feel himself equally an organ of the law objectively imposed and an organ of the common will which presides over it. And this is a psychological attitude which is developed specially in magistrates and public officials, but belongs in a general way to the citizen: it may be called the "legal sense" or the "State sense."

The Continuity of the Process and the Exigence of the Unity of the System.—The super-individual, or common will, which supports the juridical order, in making that order positive, has for its primary function the *maintenance* of the regulations of law, whence order proceeds. Such regulations may have different origins, and even precede the constitution of this unitary will to which (through logical attraction, or, one might say, centripetal force) they lead in the end; except when, as is also possible, instead of being absorbed by it, they get eliminated. In the complicated historical process the different juridical propositions, or rather the forces which support them, are liable to shocks and conflicts; and the conclusion of the process (a relative conclusion, be it understood, since the process is infinite) can only be their insertion in a positive structure, or on the contrary, their elimination. It is also true that intermediate degrees are found, compromises and adaptations among heterogeneous juridical wills; that, however, simply denotes the persistence of the crisis, which means, the continuity of the process; hence it is often incorrect to speak of a conclusion.

The maintenance of the juridical order is necessarily accompanied by its reintegration; not only through the ceaseless struggle between law and wrong, which demands an uninterrupted action of reparation and reaffirmation of the rules in force, but also because these same rules reveal themselves by degrees to be in need of correction and complement. Will, in which the positive juridical order is centred, must therefore almost simultaneously *preserve* and *innovate*; and this second function is distinguished in reality from the first only by a series of almost inappreciable passages.

As the organization proceeds, little by little, however, that centre or pivot of the common will, which at first appeared to be oscillating and ill-defined, representing little more than a virtual reference point or a common denominator of volitions still partially hostile, is consolidated and becomes effective. The compulsory nature of the rules in force, whatever their remote origin may be, appears henceforth as the effect of that centralizing will which declares itself to be a preponderant power through its own organs, and with authority sufficient not only to confirm pre-existing rules, but also to abolish them and substitute others for them.

Thus a true and proper subject (*person* in the technical juridical sense) is delineated, having its own completed autonomous will, not to be confounded with that of the individuals or the minor associations which are comprised in it; and such a will is realized, precisely, in the rulings of law which are in force in so far as they are willed by it. This subject is the State.

Definition of the State. The State Will and Juridical Transactions.—We can therefore define the State as the subject of the will which imposes a juridical order; or also, in metaphorical terms, as the centre of the radiation of the rules which compose a positive juridical system.

Consequently, it is clear that the State cannot be subjected to another will; since in that case the qualification of State would belong to the subject of the will, and to it the validity of the entire system of regulations would have to be referred. This essential autonomy or independence of the will of the State is commonly expressed by saying that the attribute of *sovereignty* is inseparable from the State.

The dogmatic construction of law, after this, may be sketched fairly simply. The whole of juridical ruling is, according to this, a creation of the State; only the State can confer a positive value not only on a rule however it arose (*i.e.* from a custom), but also on a single act of will: since, in any act whatever, legality and the capacity to produce juridical effects depend exclusively on conformity to a norm, which is as much as to say, as a hypothesis, to the will of the State. The private will *per se* thus has no value, except in so far as it is confirmed and rendered efficacious by that other superior will which determines it. On this basis is developed, for example, the common doctrine of juridical transactions.

That this construction, however, while having its own logic in relation to its premiss, corresponds neither to historical nor to psychological data, is already apparent from what we have said.

The truth is that individual wills can, by meeting, establish a limit to reciprocal exigences (in which law consists) before ever the State arises, and independently of it. Not only as an abstract principle on the grounds of pure reason, but through the concrete emergencies of life, that is, with a certain degree of incipient positivity, juridical relations may begin to grow and be determined by *rules arising from those very relations* (according to the profound Roman concept[1]); these rules the supervening State will then attribute to itself, by a sort of exclusiveness rendered necessary in order to assure the unity of the system.

That this is the true order of things, not only appears from the historical phases already passed through, but also from that of to-day. When, for instance, the State declares that contracts "have the force of law for those who made them," it expresses indeed its will, but only in the sense of acknowledging the existence of the will of others, and of adding to its efficacity. Must we, perhaps, in a homage to a dogmatic preconception, assert that the private will of the contracting parties is the will of the State, and that each one of them, in making the contract, is the organ of the State? The forced nature of this construction would be evident. The truth is that the juridical structure of the relationship is not here placed in the being of the State, as a real entity; but the State is only an ideal point of convergence, to which all the juridical determinations which belong to the system must be referred; so that, without this reference, the positive structure would seem to be cut off or undermined, and the single determinations would not, in their turn, possess fully the character of positivity.[2]

The State and the Rules of Autonomous Bodies.—The same thing applies, and with weightier evidence, when it is a question not of mere individual resolutions, as in the case of juridical transactions, but of collective organizations in existence before the State, or having arisen in the ambit of the State but developed in an autonomous manner (*juxta propria principia*).

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[1] We refer to the logical procedure effectively followed by Roman jurisconsults rather than to their theoretical pronouncements of a general character (often, as we know, not so happy, even through a false etymology) like the famous passage of Paulus: "Regula est, quae rem, quae est, breviter enarrat. Non(ut) ex regula jus sumatur, sed (ut) ex jure, quod est, regula fiat" (D. 50. 17. 1.). This passage would deserve a particular examination for which here, however, there is no room, Cf. the observations of Savigny, *System des heutigen römischen Rechts*, I Bd., 1840, par. 14, p. 47 (It. ed., p. 70), and those of Jhering, *Geist des römischen Rechts*, I Th., 5. Aufl., pp. 33 *et seq.*

[2] A further proof of this may be found in the well-known fact that in social life even juridical transactions between unqualified persons (for example between minors) have a real, though imperfect, efficacy; and the imperfection is experienced only in the act of judicial dispute, which means, with regard to the State.

Little by little as the concentration of the social will is accomplished, that is, the State is being formed, the regulations of the various organizations are referred, as far as is materially possible, to that State will, and are regarded as its emanations. Thus, *e.g.*, even immemorial customs seem at a certain point (a phenomenon well-known to the historian of law), to be valid *because willed by the legislator*; this is first of all a merely fictitious supposition and becomes historically exact only in that ulterior stage of development in which the legislative organs have really the power of abolishing, if so willed, customs: this power, moreover, in its general lines, represents, more than anything else, a limit concept.

Notable aspects are offered from this point of view by the evolution of penal law. A certain punitive justice is observed, as we know, already in primitive social groups (families and clans), especially through the authority of the *pater familias*, which for this very reason seems to us to be of a not merely private but, in a certain sense, also a public character.[1]

The penal function is indeed called to itself by the State, which with special rigour affirms and consolidates its own exclusive powers in this field. Nevertheless the fact that, even in the farthest advanced stages, a certain penal justice continues to be exercised under the name of " disciplinary power "—in the family and in other social organizations (schools, industrial undertakings, various associations and corporations)—is very significant.

This contradicts the usual dogmatic concepts; and to solve the difficulty it is not enough to declare that penal disciplinary law (and especially that which in a more restricted sense is also sometimes called " autonomous penal law ") does not properly belong to penal law[2]; since this assertion is founded simply on a presupposition that it would be necessary to demonstrate—viz. that the State is the only titular of subjective penal law.[3]

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[1] On the authority of the primitive family see the classical treatment of it by Fustel de Coulanges, *La Cité antique*, Bk. II, C. VIII; cf. on the phenomenology of penal law in its first stages, the lucid syntheses of E. Garçon, *Le Droit pénal : origines, évolution, état actuel* (Paris, 1922), pp. 23 *et seq.*

[2] Thus *e.g.* Florian, *Parte Generale del diritto penale* (ed. 4, Milano, 1934), pp. 12–15, and others here mentioned.

[3] Florian, *op. cit.*; cf. on this subject also Esposito, *Lineamenti di una Dottrina, del diritto* (Padua, 1932), pp. 177 *et seq.*; and the writings here quoted.

The truth is that the whole of this subject, about which there is no little uncertainty among the penalists, should be revised and explained according to a critical, not dogmatic, concept of statuality. We should examine it, therefore, with regard to the different sorts of cases, to see whether the penal function, even in the so-called disciplinary field, is exercised in dependence, expressed or tacit, on the rules formulated by the organs of the State ; and how and up to what point the process of referring to the disciplinary rules of the State, as a centre of the entire system, is achieved. Nor are phenomena of divergence and antinomy between autonomous juridical formations and the order of the State to be excluded *a priori.*[1]

The formation of social aggregations with their own specific orders, not originally connected with that of the State, is a phenomenon we are accustomed to observe only with regard to some typical figures of an outstanding nature : such are, for instance, certain corporative organizations of the Middle Ages, and above all, the great religious societies, and more especially, the Roman Church.

But in truth the phenomenon, saving differences of proportion, has a universal character ; since every social group tends naturally to generate its own law, or rather, it has practised in itself (in as far as it is a real and true social group and not a mere chaos) in a certain mode the logical form of law ; and it continues to develop its regulations in this same form. It is very certain that no living together and collaboration among several individuals is possible without a determination, which may be tacit but effective, of the sphere of activity belonging to each, and consequently of their respective obligations and powers. This determination may indeed be imposed by an extraneous and dominant power as something already formed and invariable (as when, for instance, a new regiment is created in an army) ; in which case it happens, *ipso facto*, almost automatically, that the new entity is inserted in the previous system, represented precisely by that power. But the most frequent, and so to speak, physiological case, is that individuals are not merely passive before the regulations which are to govern common action, but take part themselves in forming them, it may be by extracting elements from systems already created.

The problem of the fusion of these various organizations in the form of one sole will is then the same as that we have already considered. Here it matters most to note that the asserted dependence of all the social organisms on the juridical order of the State is often resolved into a *fictio juris*; for in reality social organisms exist which live *jure proprio*, being attached to the State only by extrinsic bonds or through generic relations which do not touch the structure and therefore do not destroy the autonomy of their intrinsic order. That afterwards this order has a juridical nature is deduced with certainty from the presence of logical characters already pointed out; nor could such a nature be denied through the presumed impossibility of a law which is not State law, without falling into the error of the *petitio principii*.

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[1] On a particular aspect of the vast subject see Calamandrei, *Regole cavalleresche e processo* (in *Rivista di diritto processuale civile*, A. VI, 1929, No. 2).

As to that which concerns the chief example, that of the Roman Church, it is now admitted almost without exception, and with good foundation, that the regulations emanating from it (*jus canonicum*) have really the character of law[1]; and we may be reminded incidentally that it was precisely through doubts raised in times past in this connexion that some of the most serious investigations as to the nature of law in general, like those of Bierling,[2] had their origin.

The problem which is, however, in question is that of the value of the juridical system of the Church in the system of State law, and in particular in the Italian State[3]; and the most exact formal solution seems to be that the law of the Church has force in Italy in virtue of a " remand " contained in State law, that is willed by the Italian legislator.[4] With this we succeed in saving once more the principle of the unity of the juridical order; but we admit, at the same time, the existence of an independent juridical order, which only under a certain aspect (extrinsic as regards its root) enters, or is reflected in, State law.

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[1] Against the negative opinions of some authors (Sohm, Wundt, Jhering), cf. Gény, *Science et Technique en droit privé positif*, I, pp. 60 *et seq.*

[2] V. Bierling, *Zur Kritik der juristischen Grundbegriffe* (Gotha, 1877–1883), esp. Bk. I, pp. 1 *et seq.*; and the following work of the same author: *Juristische Prinzipienlehre* (1894–1917). We nevertheless do not mean to adhere to the doctrine of Bierling as to the Anerkennung; a doctrine already confuted by Petrone in his essay on *Fase recentissima della Filosofia del Diritto in Germania* (Pisa, 1895), pp. 120 *et seq.* In our opinion the *recognition* of law is only a sign of *positivity*, which can be referred also to morals in as far as they also are positive, that is, really carried out. The element of law that is truly distinctive, as we have pointed out above, consists, on the contrary, in its bilateral nature.

[3] See on this subject especially the discussion carried on in the *Archivio Giuridico* (Vols. 90–93, 1923–1925), between Jemolo and Scaduto.

[4] Such is the opinion held signally by Jemolo, *loc. cit.*; see also by the same writer, with reference to the successive Lateran Treaties, *Lezioni di diritto ecclesiastico* (Città di Castello, 1933), pp. 64 *et seq.* On the various possible species of remand and reception, in the relations between divers juridical orders, cf. Triepel, *Diritto internazionale e diritto interno* (It. ed., Torino, 1913), pp. 155 *et seq.*; Romano, *L'Ordinamento giuridico*, pp. 112 *et seq.*

So true is this that a similar difficulty and a similar solution are discerned even when starting from the opposite visual angle, that is, by considering what is the value of Italian State law in Canon law.[1]

What makes this double consideration particularly important, even from the theoretical point of view, is the fact that it is not a question of juridical orders having each its own sphere of action, as in the case of two different States, for instance, but of juridical orders interfering with each other, in force (at least partially) in the same territory and over the same subjects : hence they cannot both, and at the same time, have the character of State in full.

International Law.—The problem of international law with regard to internal law may be posed in the same way. Here also the maxim is formulated that the validity of the regulations in force in the so-called Society of States or international Community is subordinated, relatively to a certain State, to the will of the State itself ; and this is always to maintain firmly the principle of the exclusiveness of the State juridical system. On the other hand, however, it is admitted that in the relations between various States there is effectively constituted a system of rules (partly customary) which has its own objective existence, distinct from that of the single State systems, even if they can, in a certain sense, be considered as their product.

In truth these regulations, or at least some of them as, for example, that which affirms the inviolability of covenants, have never been the object either of a formal agreement (which would obviously result in a circle in that case), or of a formal reception by means of definite States. Yet nevertheless they are in force and have a certain positivity (though an imperfect one) in as far as they are supported by a more or less universal will, which it is presumed could not fail in any State which tends to enter into relations with others. If this common will achieves a more precise unity, that is a more perfect organization, that complex of rules which leads to it would become a positive juridical order in the full sense of the term, and this means a State.

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[1] See on this the study of V. del Giudice in *Archivio Giuridico*, Vol. 91 (1924), and the other writings here referred to. According to Del Giudice, the *canonicatio* or receiving of State regulations into Canon law would not be a true reception or even a material remand, because these regulations would not be recognized as having a juridical existence before this *canonicatio*. It would be, consequently, only a reproduction, or at the most, a " reception in act." It does not seem to us, however, that the subtle distinction serves to bring to light any substantial difference as compared with the construction which is made by claiming for a basis State law. For the State also the juridical value of Canon law begins, strictly, from its reference to it.

The consequence would then be that this new order would comprise, or centralize in itself, the others (the single States) to which its regulations refer ; they would thus cease to exist as States, their quality of autonomous subjects or *centres of radiation* of positive juridical rules having, hypothetically, failed.

At the same time, and for the same reason, international (or rather inter-Statual) law, which would no longer be distinguished formally from any system of law, internal or Statual, would cease to exist *as such.* This is the very singular condition (which has something paradoxical about it) of a law which can exist only so long as it has an imperfect degree of positivity, since the perfecting of its true vigour would of necessity mark its end.

Corporative Law.—Another series of cases which are epitomized in the so-called corporative phenomenon merit attention.

The corporations of professions, arts and trades tend doubtless, for the above-indicated reasons, to elaborate their own law, if at the time of their origin they do not receive a ready-made juridical system from an external source. Is this law, worked out by the same organization, a State law ?

According to the criteria already indicated, we must consider how the relationship between the will which makes this law, and that which stands at the basis of the State juridical order, works in practice. If (as has often happened in both ancient and recent times) there is a conflict between the two wills, the reference of the corporative law to the State is excluded, while there is still possible a sort of co-existence between the two different juridical orders, each of which presses in a certain way on the other, tending potentially to take its place. This antinomy may be translated either into a tacit tolerance or open conflict ; in both hypotheses the phenomenon may be protracted even for centuries, so difficult and wearisome is the process of forming positive unitary law, or, in other words, a solid State structure. Positions of *equilibrium instabile* between the social forces are in history rather the rule than the exception.

The extreme case, in the hypothesis of a conflict, is represented by those forms of association which the State qualifies as forbidden or frankly criminal. It is notorious that even associations of this sort can have statutes and orders of a very elaborate nature, with precise determinations both of the hierarchies and of the powers of the heads, and of the obligations and powers of their individual components. There is no doubt that such determinations have a formal juridical character and, as far as they are really observed and imposed, even a positive juridical character; but positivity may be in this case only partial or imperfect, through the fact of the simultaneous presence of another opposing juridical order.

Even outside this case, which we might call pathological, the co-existence of discordant juridical orders in the same historical setting implies, at least virtually, a crisis which a mere tacit tolerance is not, certainly, sufficient to remedy.

A recent instance of such a crisis, of which the gravity appeared almost suddenly in different States, was given us in the development of syndical organizations with anti-State tendencies; that is, those associations of workers who aimed at substituting themselves for the State by gradually assuming its functions.[1] The attitudes adopted by various States towards this phenomenon were, as we know, very different and would provide matter for an extensive table of comparison, which we shall not attempt here. It is our business to consider the theoretical terms of the problem, and its possible solutions which spring from those very terms themselves.

Schemes for Possible Relations between State Law and Corporative Law.—As we have gathered from the examination of other kinds of cases, the fact that a centre of juridical determinations rises up and develops independently of the State does not prevent its being attracted, at a certain point, into the orbit of the State itself. There is indeed of necessity a tendency in this direction, as there is one in the opposite direction. Strictly speaking, both bodies have the same nature, and only differ in the amplitude and degree of positivity of the norms emanating from them respectively. We give the name of State to the one which has reached the highest degree of positivity, that is the most ample and solid unitary organization; but we must also recognize that the other body, or centre of juridical determinations, is similarly a State *in nuce*.

Supposing both aim at regulating the same relations, viz. that their spheres of application, wholly or in part, coincide, the conflict is delineated *re ipsa*, and it is clear that each of the two systems is bound to experiment on its own capacity and on its own force of attraction with regard to the other.

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[1] On this phenomenon, especially where it concerns public administration, cf. the study of Ranelletti, *I Sindacati e lo Stato* (in the review "Politica," Vol. V, 1920), and that of Rocco, *Crisi dello Stato e Sindacati* (*ib.*, Vol. VII, 1921), which, from a more general valuation of the same phenomenon, draws an argument for the formulation of a vigorous political programme.

Hence the possibility of various types or schemes of solution. The State order may affirm its supremacy over the other, which we may call corporative, in such a way as to destroy or dissolve its elements (to this type we may refer, for instance, the work of the French Revolution ; keeping well in mind, however, the differences between the corporative phenomenon of the eighteenth century and that of the period following it).

On the contrary, the corporative order may superimpose itself on the State, paralysing it or transforming its structure so that it becomes itself the State (such is, in substance, the meaning of the recent Russian revolution).

Finally, a third type of solution may come to pass, and this consists not in the dissolution but in the absorption of the corporative organizations, so that they are brought back into the orbit of the State and made subject to its real power.

Thus the regulative activity, first developed in a spontaneous or " autarchic " form, by those organizations, comes to be harmonized with the direct expressions of State sovereignty. Such a transformation, which touches the inmost fibre and the vital centres of all the regulative system, cannot happen *ex abrupto*, but only through a more or less slow process, which is always gradual. Nor is it necessary for the change to take place through formal or explicit declarations ; it may be for the most part almost invisible, being a matter not of a superficial variation but of the displacement (if one may say so) of the *centre of gravity* of a whole system of rules. Without metaphor, it is a question of wills which tend to meet : the foundation of the phenomenon is psychological and therefore the change must take place above all in the minds of the people. The *sentiment of the State* must gain the ascendant, in the consciences of the particular organizations themselves, over the sentiment of the class or corporation.

This complicated psychological nature of the process results in its being possible externally to have, as an intermediate stage, a state of suspension, in which it appears uncertain whether the norms of the corporative organizations have a statual character or not. While the process of inserting one system in another is going on, statuality itself is a *quid* in process of becoming. No wonder that the functions of the State then appear to be exercised only in part by real and true State organs, and in part by different corporative bodies or voluntary associations, even in conflict with each other. And no wonder, if, to explain these and other phenomena characteristic of the crisis, one has recourse sometimes from doctrine (similarly to what happened, for instance, with regard to custom) to ambiguous or fictitious formulas, such as that of tacit tolerance, or presumed ratification, or delegated authority : formulas which do not truly correspond to reality, but allow of a provisional interpretation of it and almost serve as scaffolding to support the system while it is being constructed.

Even here, however, it behoves us to be on our guard against illusions which might arise from the metaphorical character of the language used : the process of centralization and of subordination of the diverging energies is not accomplished (as might seem from these terms) mechanically, but with effort and tension of mind, which are often tinged with sacrifice.

When this process, in actions and above all in consciences, is sufficiently advanced and mature, it becomes easy, even formally, to establish the new arrangements, by which the State restores its sovereignty over the various organizations, which receive its imprint and become its instruments in the development of the regulative powers recognized in them or granted to them.

Such is the type of solution put into practice by the recent Italian revolution. This could be achieved almost without violence just because the same private organizations, which previously had seemed to turn against the structure of the State, now came to be permeated by a new spirit, which was the will to restore and reanimate that structure, grouping round a single centre all their energies, old and new.

Recapitulation and Conclusions.—The conclusions of this summary study may be recapitulated very briefly.

Every juridical proposition, which is not considered simply as a theorem or hypothesis but is truly willed even by individual subjects, implies an initial degree of positivity, that is a tendency towards the realization of the obligations which it signifies.

But the effectual imposition, or positivity in its full sense, takes place only when a union or synthesis of different wills is accomplished, resulting in a preponderant social will. To this new subject is then formally attributed the emanation of all the juridical propositions which compose a regulative system of social life.

This attribution or reference to a single *focus* or centre of radiation determines the unity of the system, which is obtained in practice, however, only by perpetual labour, directed towards maintaining the coherence of the different parts of the same system, while its own natural development lasts. The work of jurists aims chiefly at this; and through this, law has an organic character.

The common centre of the preponderant social will constitutes, in a word, the State. This in its most general meaning has thus at once a moment of absolutism and a moment of relativity: since it designates that which among several possible juridical systems corresponds to the predominant will and has therefore reached, in comparison with the others, the highest degree of positivity.

But actually other centres of juridical determinations exist within or by the side of the State, and these, interfering in various ways with the latter, tend to constitute so many other systems, and hence, virtually, so many other States. It is to be understood, however, that their statuality can only be partial or imperfect (hence latent and not clearly visible, like the living micro-organisms in the human body, for example), inasmuch as, hypothetically, the support of the social preponderant will is lacking.

The relations between the State and these other bodies, in the reciprocal effort towards obtaining the upper hand and autonomy, give rise to very different phenomena, which in their complications constitute in a certain manner the web of political history. We have endeavoured to indicate summarily the typical forms of these phenomena.

The life of the State thus consists of necessity in a continual reaffirmation and reintegration of its authority not only over individuals, but also, and chiefly, over those other social organizations which, operating within its sphere, either lead to the same centre, that is to say the State itself, or represent (at least potentially) a disturbing element and a danger to its existence.

It is true that in a certain sense the State cannot perish. The very relativity innate in its concept guarantees its continuity.[1] A revolution of the social energies can transform but not suppress the State; since a new equilibrium must follow on the old one, and among the various directions of the common will, whatever may be its absolute value, one must result in preponderance. This will then constitute the fulcrum of the new system.

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[1] Cf. the reflections on this of Sander, *Das Faktum der Revolution und die Kontinuität der Rechtsordnung* (in *Zeitschrift für öffentliches Recht*, Bd. I, 1919); *Die transzendentale Methode der Rechtsphilosophie und der Begriff des Rechtsverfahrens* (ib.); *Staat und Recht* (Leipzig, 1922).

But if this is true as a rule, it would be a mistake to forget that the formation, like the successive transformations of the State, is the effect of laborious historical gestations and not of miraculous creations. Only law in its beginning (we have remarked this already) is coeval with man : for the sentiment and the idea of law are a constituent and indefectible element of the human conscience, and the life of the subject is not possible without certain intersubjective relations, in which cannot but be in some way reflected the light of that idea (whence one may say briefly syllogizing : *Ubi homo, ibi societas ; ubi societas, ibi jus ; ergo, ubi homo, ibi jus*). But the historical position of law, that is the synthesis of the dictates of individual consciences in a coherent and organic system, having its own well-defined centre in a unitary will, is not as immediate ; indeed it is only possible by means of a long and complicated process. Not by chance, therefore, have we seen historians distinguishing the genesis of law from that of the State, and putting the latter to a considerably later period.

Similarly, when the structure of the State is altered or destroyed, it must necessarily be reconstituted by the constant spiritual forces which draw towards it ; but its reconstitution comes about only through a grave crisis, in which all the human virtues and passions are exercised to the point of torture, as in a crucial experiment.

It would be quite incongruous then to deduce from the relative perenniality of the State the legitimacy of a passive or quietist attitude towards it ; as if its very life did not imply the need of a continual effort and did not therefore demand the active and harmonious collaboration of all those who share it. A citizen does not belong to the State as a fixture belongs to a building : the relationship between citizen and State is not merely extrinsic or material : it is an interpenetration of spirit which exists in as far as it reaffirms itself with ever renewed will.

The problem of political organization consists precisely in the establishing of the modes and forms of this intimate interpenetration, with the object of carrying them out as completely as possible ; this may be obtained not by suppressing, but by coordinating both individual and social elements, that is private organizations, which must be brought into harmony with the supreme one.

An erroneous valuation, and consequently a bad government, of these various elements, whether in the direction of excessive laxity or of undue repression, naturally results in harm to the structure of the State. Thus, for instance, the experience of centuries shows that attempts to ignore in positive orders the natural prerogatives of the human being lead necessarily to resistance or risings against these same orders; and in just the same way, attempts to eliminate or break up all corporative associations, as intermediate forms between the individual and the State, fail to prevent in practice the revival, open or hidden, of similar associations.

The classical doctrines of juridical philosophy had, in substance, always in view this ideal: of a perfect harmony to be attained between the authority of the State and the rights of individuals; nor do the errors committed in this matter weaken the fundamental legitimacy of the assumption. The theory of the social contract itself, not in its empirical meaning, which it is too easy, and therefore useless, to reject, but in its rational one, intended to affirm the categoric necessity of the convergence of individual wills and rights —without exception or reserve—in a single authoritative centre, that is in the personality of the State, in order to render its structure unbreakable and its sovereignty unassailable.

A State can exist even when far away from this ideal of perfect harmony and complete unity. It can exist in some sort of way, when its centralizing energies only prevail slightly over those which are disintegrating or centrifugal. But these can be, nevertheless, such as to render its life wretched and uncertain, and to paralyse its activities. A State really lives and prospers only when, besides the nexus which gives a formal unity to the participants of the same juridical order, there is an ethical bond: a profound identity of wills, a real communion of spirits, an equal ardour of faith in the civil religion of the fatherland.

THE DOCTRINE OF EVASION OF THE LAW IN ENGLAND AND AMERICA.

[*Contributed by* RONALD H. GRAVESON, ESQ., LL.M.]

The Principle of the Doctrine of Evasion.—The doctrine of domiciliary control of capacity to marry is to-day apt to be treated in England with a reverence traditional of immemorial custom which is entirely undeserved ; for that doctrine, less than a century ago, was fighting its way into existence against a strongly established Common Law rule for the validity of marriage of *locus regit actum.*[1] The principle of law in both England and the United States after the War of Independence was that in contracts, and notably in contracts of marriage, the validity, including capacity to make the contract, was governed by the law of the place of making. In the Eastern Seaboard America of 1800 the basic Common Law principles were, to a large degree, true to their name,[2] and slight advantage could be taken of the rule of *locus regit actum* by those whose personal law prohibited their marriage. But two factors came into prominence during the nineteenth century which were to change this state of affairs. The rapid development of the South, and particularly the acquisition by the United States of Louisiana, a State whose law was to be found not in Coke's Commentaries, but in the Code Napoléon ; and the later unceasing expansion westwards from the Canadian border to the Gulf of Mexico brought with it the establishment of new States and of new laws in those States. The second factor was the Constitutional provision [3] which, by necessary implication, reserved to individual States the control over marriages within their territory. Both of these factors operated against the development of a common law of marriage.

The second half of the nineteenth century saw in America the development of individual State laws of marriage which varied considerably in the liberality of their provisions. Each was framed to give effect to a social need of deep local interest. With the rapid growth in the newer communities, consisting largely of colonies of European immigrants possessed of no Common Law tradition, of feelings of social solidarity, came the attachment of corresponding importance to measures for the protection and growth of such communities. State legislation arose to enunciate the degrees of consanguinity and peculiar disabilities which would prevent its domiciled citizens within those degrees or subject to those disabilities from marrying. Such prohibitions were usually against marriage within certain degrees of consanguinity, remarriage after divorce, such marriage with a paramour and the establishment of minima for the ages of legal capacity to marry. A great difference in policy existed, however, between the North and the South on the subject of mixed marriages of white and coloured people.[1] Yet the fundamental Common Law rule was strong, and marriages between persons thus legally disabled were at first held good if celebrated in another State where the parties might legally intermarry. The disadvantages of such consideration became apparent when the parties returned, as generally happened, to the State of their domicil and cohabited legally in a union which their State had prohibited. A statutory prohibition which could be evaded with ease and impunity shed neither glory upon the law nor credit upon the State which had promulgated it. Where a prohibition embodied the fundamental policy of a State, an effective sanction behind that prohibition was obviously essential. The doctrine of evasion of the law supplied that sanction.

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[1] " The truth is, that the doctrine of domicil has sprung up in this country very recently, and that neither the legislature nor the judges, until within a few years, thought much of it." *Thompson* v. *Advocate-General*, Ambler 25, (1845) per Campbell L.C. Early cases in which domicil is mentioned are : in England, *Scott* v. *Schwartz*, (1738) Comyn R. 677; in America, *Guier* v. *O'Daniel*, note in 1 Binney, 335.

[2] With the substantial exception of miscegenation.

[3] Article X.

That " the place where a man and a woman happen casually to be at the time of the performance of a marriage ceremony cannot finally determine the question of the validity of their marriage "[2] was an idea fundamental in the establishment of the doctrine of evasion. Behind that doctrine lay the feeling, expressed for England in *Brook* v. *Brook*,[3] that some form of domiciliary control was essential for the satisfactory maintenance of the moral standard in domestic relations within a State. In America compromise with the Common Law rule was effected by a resort to the doctrine that the law of the domicil is the appropriate system to govern in matters of status. Marriage was admittedly a status,[4] and in this fact lay the indirect means of control of capacity. For it was seen that a refusal by the State of the domicil of the parties to recognize their marriage celebrated in another State would constitute a strong inducement for them either to refrain from marrying or, if so marrying, to effect a change of domicil by making their home in another State. The doctrine of evasion did, in fact, operate, by means of its power over the status, on the capacity of the parties. But its effect was, in the majority of instances, indirect, and to some extent a matter of economic coercion.

Evasion in itself does not in American law constitute a decisive factor in the annulment of a marriage. It represents at the most a complementary factor, avoiding a marriage only where a further element of social interest exists, in itself alone too weak to avoid an otherwise valid contract. Much depends upon the degree of importance which the State of the domicil attaches to the particular prohibition evaded: for the social interest in the protection of social institutions constitutes an imperative demand of society that institutions so fundamental as marriage shall be guarded from danger of corruption.

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[1] *Medway* v. *Needham*, (1819) 16 Mass. 157, embodies the policy of the North with regard to prohibitions against miscegenous marriages.

[2] Goodrich, *Conflict of Laws*, (1927) para. 114.

[3] (1861) 9 H.L.C. 193.

[4] *Op. cit.*, para. 112, p. 249.

The movement demonstrated by evasion statutes in the United States from the territorial to the subjective conception of law became so widespread that in 1912 a Uniform Marriage Evasion Act was drafted for adoption by individual States. This Act resulted in the avoidance of marriages in evasion of State laws, even though one of the parties were innocent of any intent to evade. The statute has, so far, been adopted in five States.[1] The local evasion statutes of other States define variously the necessary intent in evasion in order to invalidate a marriage. All the statutes, in fact, emphasize the deep need of domiciliary control in marriage in some workable form or other, and bear witness, in the very exceptional contract of marriage, to the partial failure of the unmodified rule of *locus regit actum.*

Evasion Statutes.—Little more than half the number of the United States of America possess statutory provisions on the subject of evasion of the law.[2] This half is itself almost evenly divided into States which have either adopted the Uniform Marriage Evasion Act, together with those which declare that evasion of their law by one or more parties will avoid their attempted marriage; and States which adhere more closely to the Common Law rule of controlling the validity of a marriage by the *lex loci celebrationis.* Approximately sixteen States have declared by statute in greater or less degree for the latter rule;[3] and sixteen, inclusive of the five States adopting the Uniform Marriage Evasion Act,[4] for the domiciliary control of marriage.[5]

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[1] Vermont, 1912; Massachusetts, 1913; Louisiana, 1914; Illinois, 1915; Wisconsin, 1915. The Uniform Act was not in every case adopted word for word.

[2] See May, *Marriage Laws and Decisions in the United States*, 1929.

[3] Arizona, Rev. Code (Struckmeyer, 1928), para. 2167; Arkansas, Dig. Stat. 1921, para. 7043; California, C.C. 63; Colorado, Stats. (1930), para. 4731 (as to remarriage after divorce); Connecticut, Gen. Stats., para. 5150 (*sed quære*—vd. May, *op. cit.*, p. 82); Delaware; Idaho, Comp. Stats. 1919, para. 4599; Kansas, Rev. Stat. 1923, 23–115; Kentucky, Stats. (Carroll, 1922), para. 2101 (as to remarriage after divorce); Montana, Rev. Code, 1921, s. 5707 (except with regard to miscegenation, see *id.*, s. 5703); Nebraska, Comp. Stat. 1922; New Mexico, Stats. 1915, s. 3429; North Dakota, Laws, 1927, s. 4366; South Dakota, Rev. Code, 1919, para. 112; Utah, Comp. Laws, 1917, 2969; Wyoming, Comp. Stat. (1931), 4972.

[4] *Supra.*

[5] The eleven are: The District of Columbia (Code, 1930, Tit. 14, para. 5); Arizona (Rev. Code, 1928); Colorado (Stats. 1930); Connecticut (Gen. Stats., para. 5150); Georgia (Code, 1926, para. 2943); Indiana (Ann. Stat., Baldwin, 1934, para. 5629); Maine (Rev. Stat. 1930); Mississippi (Ann. Code, 1930, para. 2361); Montana (Rev. Code, 1921, s. 5703); Virginia (Code, 1924, para. 5089); and West Virginia.

The Uniform Marriage Evasion Act [1] invalidates marriages celebrated outside the domiciliary State which would have been void if taking place within the State: it has no reference to marriages which are merely voidable; nor does it make any discrimination between invalidating a marriage for breach of a formal and of an essential requisite. It is merely a statute of reference, avoiding all marriages which the State adopting the Act has declared shall be void. The evasion statutes of Arizona, Connecticut and Georgia, to take but three examples from very different sections of the country, resemble the Uniform Act in effect, if not in words, and forbid whatever is prohibited within the State. A similar result obtains from the evasion laws of Virginia, West Virginia, Mississippi, Maine, Delaware and the District of Columbia, which, shortly, forbid a marriage anywhere if contrary to sections of their marriage statutes. The effect of many of these Acts, however, is in practice more in harmony with the social policy of upholding a marriage than that of the Uniform Marriage Evasion Act; and a marriage between persons domiciled in a non-uniform State, valid by the *lex loci celebrationis* but invalid by the personal law, will usually be recognized by the *lex domicilii* unless seriously conflicting with the fundamental social interests of that State.[2]

The scope of the evasion statutes of different States naturally varies in its reflection of the social interests and public sentiments of each State. Some States find few prohibitions necessary: each State has in some degree its own peculiar problem to face. The evasion statute of Montana is such an instance,[3] having reference only to miscegenation, and in a section of the country which has a higher proportion than many other parts of Chinese and Japanese is directed against marriages of white people with Negroes, Chinese and Japanese; in the last two cases a matter of nationality as much as of colour, since the prohibition is restricted to the two nations, and not extended to the yellow races generally. Colorado, too, in its proximity to Utah, has in the past directed its evasion laws against polygamy. But the most notable example of the function of this doctrine in counteracting the tendency towards the formation of unions productive of social evil is seen in the anti-miscegenation laws of the greater number of those States south of the latitude of Delaware; a policy for the most part embodied not in statute but in Common Law rules of forensic growth.

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[1] (1912) s. 1 reads as follows: "If any person residing or intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

[2] Goodrich, *Conflict of Laws*, p. 264; cf. the American Law Institute's *Restatement of the Conflict of Laws*, (1934) para. 129.

[3] "Every marriage hereafter contracted without the state between a white person and a Negro, Chinese or Japanese, either party being a former resident of Montana, shall be null and void within Montana." Montana, Rev. Code (1921), s. 5703. For the general law of marriage in this State, see *id.*, s. 5707.

The effect of the evasion statutes varies in different States on another ground: some States[1] refuse to invalidate a marriage if one only of the parties is guilty of evasion, or, on a similar but distinguishable ground, if one party only is domiciled in the State whose law is evaded. Others,[2] however, led by the example of the Uniform Marriage Evasion Act, use in their text the singular only, and hold marriages void where one party alone is guilty of evasion or domiciled within the State. And the strict construction of statutes in derogation of the Common Law rule and policy of upholding a marriage valid by the *lex loci celebrationis* may be seen, particularly in the South, to give way to a policy of avoiding those marriages which are locally regarded with overwhelming social abhorrence.[3] In cases where one party alone is domiciled in the State whose law has been evaded, the refusal of that State to recognize any marriage status arising from the contract cannot affect the power of the State of domicil of the other party if the latter's personal law allows the marriage. The non-recognition is limited to the State refusing such recognition.[4]

A third ground of divergence between the evasion statutes found in different States lies in the requisite intent of the parties in the fact of leaving the State of their domicil to marry where another legal system permits. The Uniform Marriage Evasion Act is entirely objective in its attitude: its strict view is that marriages are void where one party has in fact left the State of his domicil and married elsewhere, always provided that such person's intention is " to continue to reside " in the State of his domicil after the ceremony. Some States,[5] on the other hand, require an affirmative proof of an intent to evade their respective laws, and show a greater tenderness for the preservation of existing and consummated marriages. Thus, Massachusetts requires proof of a deliberate intent on the part of both parties to evade the statute, and thereby opens wide the door to evasion of the law.[6]

[1] Arizona, Rev. Code (St. 1928), para. 2167; Delaware; Georgia, Code (1926), para. 2943; District of Columbia, Code (1930), Tit. 14, para. 5; Indiana, Ann. Stat. (1934), para. 5629; Virginia, Code (1924), para. 5089; Connecticut, Gen. Stat., para. 5150; Maine, Rev. Stat. (1930), C. 72, para. 9.

[2] *E.g.* Montana, Rev. Code (1921), s. 5703; West Virginia; and Wyoming, Comp. Stat. (1931), 4972.

[3] See Munson, " The Extraterritorial Force of Personal Statutes," 13 Col. L.R. 314, at p. 316.

[4] Beale and Others, " Marriage and the Domicil," 44 H.L.R. 501; *Palmer* v. *Palmer*, 265 Mass. 242; *Stevens* v. *Stevens*, 304 Ill. 297; *Weinberg* v. *Weinberg*, 242 Ill. App. 414; *Meisenhelder* v. *Chicago and N.W. Railroad Co.*, 170 Minn. 317.

[5] *E.g.*, Indiana: Ann. Stats. (Baldwin, 1934), para. 5629: " If persons resident in this state with intent to evade the provisions of s. 1 and s. 3 (paras. 5625, 5627) go into another state and there have their marriage solemnized with the intention of afterwards returning and residing in this State, such marriage shall be void. . . ." *Roche* v. *Washington*, 19 Iowa, 53; and Maine, Rev. Stat. (1930), C. 72, para. 9, which requires a similar intent to evade provisions as to consanguinity, mental deficiencies and polygamy.

[6] *Commonwealth* v. *Lane*, 113 Mass. 458; *Murphy* v. *Murphy*, 249 Mass. 552.

The Reporter[1] of the American Law Institute and his collaborators have incorporated the fruits of deep research into a few sentences of the Restatement of Conflict of Laws. In expressing what they consider to be the more firmly established rule in a nation of diverse and conflicting legal systems, they have kept before them the fundamental Common Law principle in favour of marriage, and declared that evasion of the domiciliary prohibitions cannot in itself avoid a marriage valid where celebrated.[2] This primary rule is, however, subject to important exceptions, which to a great extent simply codify the American Common Law upon the subject of evasion.[3] In avoiding a marriage which falls under one of these exceptions where one party alone is guilty of evasion, the Restatement betrays the influence upon it of the policy of the Uniform Marriage Evasion Act and of subsequent evasion statutes modelled thereon. Particularly in subsection (*d*) of paragraph 132[3] does it admit a wide degree of domiciliary control, universal in operation, not upon the status alone, but upon the contract itself.

Such represents shortly the statutory control of the marriage by the law of the domicil. Possibly it is out of respect to the Common Law rule, which delegates control over the validity of marriage to the *lex loci celebrationis*, that one finds almost no reference in the statutes to the domicil as such. As is frequently the case in American legislation, reference is made not to domicil but to residence. The words of the Uniform Marriage Evasion Act are typical of this common characteristic of phraseology.[4] But, " That these statutes, although stated in terms of residence, constitute an exercise of the power of the state over its domiciliaries becomes apparent when an actual change of domicil is effected by the parties." [5]

Evasion of the Law in England.—English law has not adopted the doctrine of evasion as a method of domiciliary control of marriage. It remains to be considered whether our law might profitably adopt this doctrine, and whether the framing of a statute similar to the American Uniform Marriage Evasion Act would be for English law a change for the better. The doctrine of evasion is not a theory of control for a country in a state of comparative isolation: its most useful field of operation is clearly in a federal union of autonomous States, where movement from one legal system to another is unhindered by customs, language or national barriers. Its effective application depends much upon comity and the existence of common social interests, a situation obviously more likely to be present in a federal union of States bound together by the ties of common sympathies than in the atmosphere of aggressive independence in which members of the family of nations manage to coexist.

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[1] Professor Joseph H. Beale.

[2] *Restatement*, para. 129 : " If the requirements of the law of the State of celebration are complied with, the marriage is valid everywhere, except under the circumstances stated in para. 131 and para. 132, although the parties to the marriage went to the State in order to evade the requirements of the law of their domicile."

[3] *Restatement*, para. 132 : " A marriage which is against the law of the State of domicile of either party, though the requirements of the law of the State of celebration have been complied with, will be invalid everywhere in the following cases : (*a*) polygamous marriages ; (*b*) incestuous marriages between persons so closely related that their marriage is contrary to a strong public policy of the domicil ; (*c*) marriages between persons of different races when such marriages are at the domicil regarded as odious : (*d*) the marriage of a domiciliary which a statute at the domicile makes void even though celebrated in another State."

[4] " If any person residing and intending to continue to reside in this state . . . " s. 1.

[5] J. H. Beale, *Conflict of Laws* (1935), para. 129.4, p. 682.

To say that England knows no doctrine of evasion of the law is not to say that English law is never evaded. The simplest instances of Gretna Green and, before 1753, Fleet marriages, show in almost every case, and they were many, an apparently intentional evasion of the requisites of English law in order to enjoy, in the case of the Gretna Green marriages, the greater freedom of contract allowed by the law of Scotland.[1] Even in cases like these, where England could have made the attempted evasion ineffectual by raising matters of parental consent to the dignity of essentials in marriage, she chose, as a matter of more prudent policy, not to do so. It is apparent from an examination of English cases on marriage that in this field of law the courts have intentionally avoided establishing a doctrine of evasion by a deliberate refusal to base their decisions upon such a ground.

The *Sussex Peerage Case*[2] deals with facts which suggest an obvious attempt to evade the provisions of the Royal Marriage Act,[3] yet the decision is based on a construction of the extent of the territorial application of a statute; and the statute being held "not (to) enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally, and in the abstract,"[4] a marriage celebrated in Italy was held void for non-compliance with the provisions of the statute. In an Irish case[5] wherein an Irish minor married a Scots girl in Scotland without the statutory consent[6] of his guardian, the judge thus disposed of any question of intentional evasion avoiding the marriage: "I cannot find that any Act of Parliament such as this has ever been extended to cases not properly within it, on the principle that parties endeavoured to evade it." The marriage was held valid. Again, where the parties were of French nationality and domicil,[7] and married while on a visit to England made for the purpose of evading the conditional provisions of French law as to parental consents or the performance of *actes respectueuses*, the question of evasion was dealt with in the English court on the authority of the early cases,[1] and the decision based upon a determination of the formal or essential nature of the requisites of French law which the parties had so clearly sought to evade. The marriage was held valid in England, despite a decision to the contrary of the Civil Tribunal of the Seine on the grounds of non-publication of the marriage in France and of evasion of French law.

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[1] *Compton* v. *Bearcroft*, cited in note to *Harford* v. *Morris*, 2 Hagg. Cons. 444, is an instance of such a marriage which was held valid. The rule that a marriage celebrated outside England in evasion of English law was valid by that law was first settled in 1768 in this case by the High Court of Delegates. See also *Dalrymple* v. *Dalrymple*, (1811) 2 Hagg. Cons. 54; *Scrimshire* v. *Scrimshire*, (1752) *id.* 395; *Swift* v. *Kelly*, (1835) 3 Knapp. 257.

[2] 11 Cl. and F. 85.

[3] 12 Geo. III, cap. 11.

[4] 11 Cl. and F. 85, per Tindal L.C.J., at p. 144.

[5] *Steele* v. *Braddell*, Milw. Ecc. 1.

[6] Under the Irish statute 9 Geo. II, cap. 11.

[7] *Simonin* v. *Mallac* (1860) 2 Sw. and Tr. 67.

The sequence of cases on the matter of consanguinity [2] show a remarkable consistency of treatment in at least one respect : the studied avoidance of any use of evasion as a *ratio decidendi*. The facts in all four cases were similar : two persons,[3] domiciled in England, where their degree of relationship prevented their lawful marriage, went abroad to a country whose law allowed marriage within such degree of consanguinity, and after a ceremony of marriage had been performed, returned to England.

The earliest of these cases [4] contains no discussion of evasion, and the decision in it is based upon the duty of liege subjects of Her Majesty to obey English law.[5] *Brook* v. *Brook* [6] was decided by three out of the four Law Lords [7] on a similar ground as their principal *ratio decidendi*, and additionally by the Lord Chancellor on the power of the law of the domicil to control the essentials in marriage.[8] Perhaps the nearest approach to a statement of evasion in this case may be found in Lord Campbell's words : " It is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicil if the contract is forbidden by the law of the place of domicil as contrary to religion, or morality, or to any of its fundamental institutions." This is in fact a statement of domiciliary control of essentials in marriage, but shows how close in purpose and intent that theory is to the American doctrine of evasion of the law.

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[1] " *Compton* v. *Bearcroft* is therefore an authority to this extent, that a marriage contracted by English domiciled subjects abroad, where it is not prohibited by English law, will not be held bad because the parties have gone thither to evade the necessity of complying with certain conditions that would have been imposed upon them in England." *Simonin* v. *Mallac*, 2 Sw. and Tr. 67, at p. 83, *per Curiam*.

[2] *Mette* v. *Mette*, 1 Sw. and Tr. 416 ; *Brook* v. *Brook*, 9 H.L.C. 193 ; *In re De Wilton*, [1900] 2 Ch. 481 ; *R.* v. *Dibdin*, [1910] P. 57.

[3] In *Mette* v. *Mette* (*supra*), the husband alone was domiciled in England.

[4] *Mette* v. *Mette* (*supra*).

[5] " At the time of the second marriage he, as a natural liege subject, owed obedience to the sect. 5 and 6 Will. IV. c. 54, and could not contract a marriage in contravention of it." *Id.* at p. 424, per Cresswell J.

[6] 9 H.L.C. 193.

[7] Campbell L.C., Cranworth and St. Leonards.

[8] " But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii* . . ." per Campbell L.C.

In *De Wilton's Case*[1] the decision of Mr. Justice Stirling was purely on the construction of an English statute establishing prohibited degrees of consanguinity, and permitting certain privileges in matters of form to Jews and Quakers. No discussion arose of evasion of English law. The characteristic of these cases is an exhortation to obey the law, not an admonition for evading it. In all the three cases the marriage was held void without recourse to any doctrine of evasion.

In the fourth case, *R.* v. *Dibdin*,[2] as glaring an example of intentional evasion of English law as one can find, the parties, a man and his deceased wife's sister, visited Canada for the sole purpose of there marrying, since the Deceased Wife's Sister's Marriage Act[3] had not been passed in England to sanction such marriages. They returned to England later in the same year, after the passing of the enabling Act[4] in England. One finds, in the judgment of Darling J., that the real *ratio decidendi*, the function of domicil, is a principle of such common acceptance as to be relegated to the indignity of parentheses.[5]

On the subject of the evasion of statutory prohibitions against remarriage after divorce, the English cases show a difference of treatment which is irreconcilable with any doctrine of evasion of foreign laws. In *Scott* v. *A.-G.*[6] the capacity of Mrs. Scott to remarry was based upon her change of domicil from Natal to England, and the motive for the change was not considered. The penal nature of the South African prohibition against her remarriage confined its operative validity to Natal. In 1890 Sir James Hannen, who had decided the case of *Scott* v. *A.-G.*, was called upon to determine the effect to be given to an Indian prohibition against remarriage for six months after decree absolute of divorce, and he found a marriage celebrated in contravention of that prohibition void. His decision was again based upon the fact of the woman's domicil and, in this case, the non-penal nature of the prohibition.[7] In both cases the fact of evasion is clear: but, just as an unlawful motive is immaterial in effecting a change of domicil,[8] so the motive in removing oneself to another jurisdiction does not bring into operation any doctrine of evasion. *Drexel* v. *Drexel*[9] was such a case of the intentional abandonment of an English domicil of choice and the acquisition by residence for a statutory period of a French domicil, by an American citizen who desired to obtain a divorce under French law. This doubtful motive was not considered by

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[1] *In re De Wilton*; *De Wilton* v. *Montefiore*, [1900] 2 Ch. 481.

[2] [1910] P. 57; (C. A.) *id.*, p. 101. [3] 7 Ed. VII. c. 47. [4] *Id.*

[5] "That marriage, though valid according to the law of Canada, was invalid here in England (for the promoters were of English domicil); but on August 28, 1907 their marriage became valid here, as a civil contract, by the operation of the Deceased Wife's Sister's Marriage Act, 1907." Per Darling J., [1910] P. 57, at p. 79.

[6] (1886) 11 P. D. 128.

[7] *Warter* v. *Warter*, 15 P.D. 152; acc. *Le Mesurier* v. *Le Mesurier*, 142 L.T. 496.

[8] *Fasbender* v. *A.G.*, [1922] 1 Ch. 232; (C.A.) 2 Ch. 580; *Drexel* v. *Drexel*, [1916] 1 Ch. 251; *Briggs* v. *Briggs*, (1880) 5 P.D. 163; Dicey, *Conflict of Laws*, 5 ed., p. 86; Baty, *Polarized Law*, (1914). The rule that motive is indifferent is accepted in the United States—see Goodrich, *Conflict of Laws*, s. 25. [9] [1916] 1 Ch. 251.

Mr. Justice Neville as a vitiating element in the acquisition of a foreign domicil, and recognition was consequently accorded to divorce proceedings instituted in the French courts.[1]

The question naturally arises as to why England has no established doctrine of evasion of the law ; and why, moreover, English judges have so diligently avoided sowing the seeds of any such doctrine in the many instances in which they must have been tempted to do so. It was no new and untried theory. Before them the English judges had the example in America of the doctrine of evasion at work in a Common Law system : cases involving the French doctrine of *fraude à la loi* came before our courts on more than one occasion.[2] One is driven to the conclusion that the introduction of such a doctrine to English law was considered unnecessary as a means of control of capacity to marry.[3] *Brook* v. *Brook* [4] imposed on the law of the domicil a burden which it was very capable of bearing. That conception was, in 1860, far from overworked. The introduction of a second theory of control before domicil had scarcely had the opportunity to function was undesirable, and might well have caused confusion in the cases, which they succeeded in great measure in avoiding. It is, in the words of a great man,[5] better that the law be settled than that it be just. *Brook* v. *Brook* was, moreover, a decision of the House of Lords, with all that is thereby implied. As for the flaunting of England's public policy, little of that took place in matters of the essentials of marriage, and only in matters of parental consents, whether rightly or wrongly considered a formality, was evasion of English law in fact possible. Nor were the frequent cases of runaway marriages to Scotland or the Continent in strict fact serious evasion of English law. The rule of law was, that consents were a matter of form, to be governed by the *lex loci contractus*. For marriages in England certain consents were required. Gretna Green marriages appear to be taking advantage of, rather than evading, the rule of law that consents are a formality, to be controlled by the law of the place of celebration of the marriage, and that the English requisites are intended to apply only to England. The couples who took the mail coach to the North were at once taking advantage of one rule to evade the other. They, at least, had the intention to evade the provisions of English law as to consents and other formalities. Evasion as a factual situation existed : evasion as a legal doctrine did not exist.

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[1] Cf. *R.* v. *Russell*, [1901] A.C. 446, where held that the mere purpose in going to the United States to obtain a divorce did not constitute the necessary intent for the acquisition of a domicil in one of those States : the attempted evasion as such of the English divorce law was not made a *ratio decidendi*.

[2] *E.g. Simonin* v. *Mallac*, 2 Sw. and Tr. 67 ; *Ogden* v. *Ogden*, [1907] P. 107 ; [1908] P. 46.

[3] " . . . the validity of a marriage is in no degree affected by the fact that the object of the parties in marrying away from their own country is to evade the requirements of the law of their domicil as to consents, publicity, etc., or that no regular ceremony is required by the law of the country where the marriage takes place." Dicey, *Conflict of Laws*, 5 ed., p. 737.

[4] (1861) 9 H.L.C. 193.

[5] Oliver Wendell Holmes.

America has taken the course of adopting a doctrine of evasion of the law as her means of domiciliary control of the essentials in marriage: England a system of domiciliary control of capacity to enter into the contract. Cases show how similar in the two countries is the treatment of similar facts when subjected to their respective doctrines of control by the law of the domicil. England had no doctrine of evasion of the law: yet the words of Lord Campbell [1] might well be taken from an American judgment in a case involving domiciliary prohibitions against marriage. It is not easy to see what advantage the adoption of the doctrine of evasion would have conferred upon English law which the theory of domiciliary control of essentials in marriage could not give. The two theories are, in fact, so similar fundamentally that their difference in operation is, in practice, not of great importance. Both are arrows from the same sheath, aimed at the same objective. Both are means to an end: and the similarity of purpose for which they are employed is a more important consideration than the diversity of means whereby that purpose is achieved.

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[1] *Brook* v. *Brook*, 9 H.L.C. 193, *ante.*

RECENT MODIFICATIONS OF FRENCH COMPANY LAW.

[*Contributed by* MAÎTRE CAMILLE DENOYER.]

Situation before the Decrees.—For some time past proposals for the improvement of the Company Law have been not infrequent.

Some of these were submitted by Members of Parliament, one even by the Government. A common object inspired them all, namely, the more efficacious protection of savings, a fact which has suggested the observation that the object was political rather than legal.

It has been pointed out that bearing in mind the enormous development of limited companies, the wide distribution of property in France and the thrifty character of the population, only a small proportion, 1 per cent. of the funds (as a whole, extremely large), invested in limited companies is the property of the directors ; a much greater proportion is in the hands of a considerable number of small shareholders ; for instance, there are 40,000 stockholders of the Banque de France, and amongst those 40,000 stockholders there are 25,000 who have one or two shares only. Several other examples of this kind could be given.

But though the funds are vested in a large body of shareholders, the directors are nevertheless all-powerful ; they hold seats on several boards of directors and the methods of control are admittedly ineffective. Those methods of control are :

(*a*) *Shareholders' Meeting.*—Only a few are present at these meetings, and the directors arrange things in such a way that they are sure of a majority.

(*b*) *Auditors.*—In addition to the fact that anyone, without any guarantee of his capacity or independence, can be put forward, the auditor is chosen by the general meeting ; that is to say, really by the board of directors itself, since the board usually controls the majority at the general meeting.

Laws by decree have been designed to ensure better protection for savings and this is the object they seek to attain. The laws by decree have also had another object ; it has happened too often that unscrupulous individuals have registered a company with the sole idea of sheltering themselves from commercial risks. If the company failed, so much the worse for the creditors ; the company was wound up and a new company formed. Remark further that the decree laws have sought to attain their aim by increasing penalties against certain infractions or by repressing practices that the law had not foreseen.

Principal Modifications effected.—The methods adopted for the protection of shareholders are the following:

I. The responsibility of directors and managers is increased;
II. The choice of auditors is regulated;
III. New rights are given to shareholders and bondholders;
IV. Companies are required to draw up balance sheets in the same way each year;
V. Publication of company documents is regulated.

We proceed to consider the changes under each of these heads in order.

I.—Increase of Responsibility of Directors and Managers.—It is necessary to bear in mind the position of the directors in this respect before the decree-laws.

Directors of a company were liable civilly or penally.

Civil liability was based on Art. 44 of the law of July 24, 1867: "Directors are liable, to the company or to third parties, in conformity with the general rules of law separately or jointly, according to the case, for breach of the rules of the present law, or for gross negligence, especially in distributing or allowing the distribution of fictitious dividends. The damage must be proved to be the direct consequence of the fault.

This liability of the directors may be classified under three heads: (*a*) failure to comply with the provisions of the law relating to the formation and management of companies (*e.g.* liability for damage caused to the company by failing to hold a general annual meeting); (*b*) breach of the articles of association; (*c*) faults of management.

The liability of the directors is separate; that is to say, that they are liable for and in proportion to their own faults; this liability, however, is joint if the mistake is imputable to all the directors so that it is impossible to determine the degree of responsibility of each. As against each director sued, effective damage must be proved, as his responsibility is limited to the extent of the damage resulting from his own fault.

As to penal responsibility, the law of July 24, 1867, provides for and forbids a certain number of things, such as: simulated subscriptions or payments for shares, publication of false facts, irregular issue of shares, irregular negotiation of shares, introduction of false members into a meeting of shareholders, payment of dividends out of capital. Directors are also penally responsible for such crime as obtaining by false pretences.

The changes now effected in the law may also be grouped under three heads: (*a*) increase of penalties; (*b*) creation of new offences; (*c*) disabilities imposed on directors and managers.

(*a*) *Increase of Penalties.*—The penalties for false pretences are increased by decree of August 8, 1935, to a fine of 50,000 francs maximum, and to a maximum of ten years' imprisonment.

Henceforth also, if a company be wound up, the court may declare bankrupt any manager or other person who has, for his private profit, entered into commercial transactions or disposed of the funds belonging to the company as if they had been his own property.

We used the words: " the court may " because the exercise of the power is not obligatory but merely discretionary.

(*b*) *Creation of New Offences.*—The same decree imposes upon managers, directors or liquidators of a company in course of winding up, the penalties inflicted on traders in bankruptcy.

When a trader is declared bankrupt by the Commercial Court, he can afterwards be tried in *Tribunal Correctionnel* if guilty of *banqueroute simple, e.g.* if bankruptcy was the result of (1) reckless trading or extravagant living; (2) using large sums of money either for gambling or for fictitious transactions on the stock exchange or in commodities; (3) if, to stave off bankruptcy, he has purchased with the intention of under-selling the market. Or if, with the same object, he has borrowed, or put bills into circulation, or tried any other ruinous means of obtaining money; (4) if after suspension of his payments he pays a creditor to the prejudice of other creditors. The penalty is imprisonment for a minimum of one month and a maximum of two years.

The trader in bankruptcy may be declared guilty of *banqueroute frauduleuse* if he has falsified his accounts or concealed any of his assets or, if in his books, or by written documents or agreements under his hand, or in his balance sheet, he has fraudulently shown as debts sums of money which he does not owe. The penalty for *banqueroute frauduleuse* is penal servitude.

Managers of companies not being traders could not, however, be made liable to the penalties of the *banqueroute simple* and *banqueroute frauduleuse*. This unjustified difference of treatment has been abolished by a decree-law of August 8, 1935, which states: " that should a company be wound up the following are liable to the penalties mentioned in paragraph 3 of Art. 402 of the Penal Code (*i.e.* imprisonment of one month at least and to two years maximum), managers, directors or liquidators, and generally speaking any officials who in the course of their employment and in bad faith have: (1) spent sums of money belonging to the company, by carrying out speculative or fictitious transactions on the stock exchange or in commodities; (2) made purchases with a view of selling under the market price in order to defer the winding up of the company, or, with the same intention, have borrowed money, put bills into circulation, or adopted any other ruinous means of procuring funds; (3) paid a creditor or caused him to be paid to the prejudice of others, after the company has ceased payment; (4) forced the company, in the interest of others, to enter into contracts or engagements which may be considered too onerous having regard to its position; (5) committed any offence provided for and punished in Arts. 18 and 19 of the law of March 18, 1919, relating to the commercial register; (6) omitted, fifteen days after payments have been stopped, to declare the same to the registrar's office of the Commercial Court, as required by Arts. 438 and 439 of the *Code de Commerce*; (7) whether directly or indirectly, have failed to keep the books of the company regularly and up to date."

Another article of the same decree stipulates: "that in the case of a company being wound up, the following shall be liable to the penalties mentioned in para. 3 of Art. 402 of the Penal Code" (*i.e.* penal servitude): namely, managers, directors or liquidators of a limited company and, generally speaking, all officials who have fraudulently abstracted the books of the company, or concealed any of its assets, or if in written documents, or in the balance sheet, they have represented that the company owes money which it does not in fact owe.

Other acts which hitherto have not constituted an offence at law will now be subject to the penalties for false pretences, viz.:

(1) False statements on oath as to the genuineness of subscriptions for shares and false declarations as to the due payment to the company of subscription money. This provision concerns the legal requirement that the whole of the capital must be subscribed before a *Société anonyme* can be constituted and the further requirement as to the payment up of a quarter of the nominal value of the share capital.

(2) Publication or presentation of a false balance sheet with intent to misrepresent the true situation of the company. To constitute an offence the presentation must have been made to the shareholders. Moreover, the publication or presentation of the balance sheet must have been made with the intention to hide the real situation of the company. In deciding whether or not an offence has been committed, the whole of the circumstances are to be taken into consideration by the court.

The publication or presentation of a false balance sheet constitutes in itself a legal offence, and not the drawing up or signing of the document. Therefore all who are directors at the time of publication or presentation are liable to be prosecuted even though publication or presentation is made by one of them only. But directors who could prove their good faith in the matter would not be held responsible.

(3) The use by directors of the properties or moneys of the company in bad faith and for their own interest knowing such use to be prejudicial to the company, and the favouring by them of another company in which they are directly or indirectly interested. For example, when a manager uses the company's funds to help another firm which has no connection with the first company but in which he has a personal interest.

(4) Use by managers in bad faith of the powers at their disposal for an end which they know to be detrimental to the company's interests but which is to their personal advantage or that of another firm in which they are interested.

(*c*) *Cases in which the Managers of Companies are made subject to certain Disabilities.*—Henceforth and in accordance with Art. 6 of a decree-law of August 8, 1935, anyone who has been convicted, by a definitive judgment, of crime, theft, false pretences or breach of trust, extortion, voluntary issue of cheques without provision, or for attempt thereof, as also every person adjudicated bankrupt is to be thereafter incapacitated from acting as director or manager of a limited company.

This applies also to persons convicted by a foreign court of any of the acts above mentioned. If, however, the court is a foreign one, the incapacity is not imposed *ipso jure*, but must be ordered by a French court after verification that the foreign penal judgment is legal.

Furthermore, if a limited company is wound up, the managers and directors can, if guilty of gross negligence, be condemned by the Commercial Court to a similar incapacity.

II.—Regulation of the Choice of Auditors.—The law of 1867 provides that in every limited company there shall be one or several auditors whose duty is to " make up a report regarding the balance sheet and accounts presented by the directors, which report is to be laid before the company at the general meeting." The auditors were appointed at the shareholders' meeting, no guarantee of capacity or independence being required. As the directors usually held the majority of votes at these meetings, it follows that control was practically non-existent.

Many remedies were suggested and numerous schemes worked out.[1]

By a decree-law of August 8, 1935, it is henceforth the duty of the auditors of the company to examine the accounts, the cash book, the documents and any bills or papers of the company, to see that the inventories and balance sheets have been properly drawn up, and to verify the genuineness of the information given in the accounts of the company and in the report of the board of directors.

The auditors may at any period of the year proceed to any examination they think desirable. They may also, in an urgent case, call a general shareholders' meeting.

The following are not qualified for appointment as auditors: (*a*) parents of a director of the company; (*b*) persons receiving remuneration from the directors, or from the company; (*c*) persons not qualified to be appointed manager or director of a company.

In the case of issuing companies, one auditor at least must be chosen out of a list established by a body of magistrates.

Severe penalties may be inflicted on auditors, *e.g.* an auditor may be sentenced to imprisonment of one to five years, and/or is liable to a fine of 1,000 to 20,000 francs, who has knowingly given or confirmed false information on the situation of the company, or has concealed from the *Procureur de la République* any facts relating to a misdemeanour of which he was aware.

III.—Additional Rights given to Shareholders and Bondholders.—Various measures have improved and extended the rights of the shareholders. The decree-law of August 8, 1935, states that, notwithstanding any contrary provision in the memorandum, the shareholders have, proportionally to the amount of their shares, the right to subscribe by preference to shares issued upon an increase of capital. This was done to safeguard the interests of the shareholders who at the beginning of the company's existence ran the risks of the business and by an increase of the capital might lose all control over the business for the benefit of another group.

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[1] In fact, the decree seems to have followed closely many regulations of the English Companies Act of 1929, especially regarding the auditors, the drawing up of balance sheets and the inspection of documents.

Moreover, the shareholders have the right, during the fortnight preceding a general meeting, to examine the balance sheet, the profit and loss account, the inventory and the list of the shareholders ; also all documents which are to be submitted to the meeting. They are also entitled to make copies of all documents submitted to the last three general meetings. A final judicial decision obtained by any bond shareholder concerning their common rights will be available to all the other bond shareholders if so directed by an order of the president of the court made at their request.

IV.—Obligation on Companies to draw up their Balance Sheet in the Same Way each Year.—Not only has the Government intended to render the control carried out by the shareholders more effective, by organizing a better way of communicating the documents, as stated above, but it has also tried to render their control easier by requiring that each company shall draw up its balance sheet in the same way each year; the methods of valuation of the various items must be unchanged. Of course, necessary modifications may be made in the drawing up of balance sheets. But these must be decided upon at the shareholders' general meeting after production of a statement from the auditors at the said meeting explaining and justifying the nature of the proposed modification. Breach of this provision is punishable by a fine of 1,000 to 10,000 francs.

V.—Publication of Documents.—It is not necessary here to enter into details. However, three items are worth remarking : (1) a copy (two in future) of the Articles of Association must be delivered to the registrar of the Commercial Court ; (2) the principal Articles must be published in a legal paper ; (3) registration of the company must be effected with the Commercial Registrar.

Special provision is made in the decree-law that before any foreign commercial company establishes a branch in France, the person who is to be its manager must deposit with the registrar two copies on stamped paper of the company's Act, translated if necessary into the French language and certified by the competent foreign authority. He must, furthermore, deposit for registration with the Commercial Registrar such statements and documents as are required in the case of French companies, *e.g.* the Articles of Association and modifications thereof,

COMPETITION AND THE LAW.

[*Contributed by* E. WYNDHAM WHITE, ESQ., LL.B.]

THERE was apparent, immediately after the war, a sharpening of the social conscience to the evils attendant upon unlimited competition in industry. The result has been an increasing emphasis on those branches of the law regulating business conduct, and to the building up in the United States of a nominate wrong of "unfair competition." The movement has been one of remarkable generality, both in Europe and the United States. In the latter country, with its industrial system organized around great combinations and trusts, the development has been both rapid and comprehensive. In Europe the tendency has been to tackle the problem piecemeal, whilst in Great Britain direct legislative action has been comparatively insignificant. It is proposed at the outset to consider the attitude of the Common Law to the subject of competition in business, then to pass in review the attempts of the legislatures of Europe and the United States to cope with the problem.

Competition and the Common Law.—In English law there is no nominate wrong of unfair competition, but certain practices have from time to time been disapproved by the law as being contrary to the public interest and have been declared illegal. Thus as early as the reign of Elizabeth there was an outcry against monopolies. The evils which were the basis of this agitation were, firstly, the power the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; secondly, the power which it engendered of enabling a limitation on production; and thirdly, the danger of deteriorization in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.[1]

In the circumstances of that time these consequences could only follow the exercise of sovereign power, and whilst legislation was directed against the exercise of such power no restrictions were placed upon the creation by an individual of a monopoly as such.[2]

On the other hand it was conceived that individuals might by an abuse of their contractual powers produce similar evils to those consequent upon monopoly, such, for example, as the enhancement of prices, and so laws were passed relating to the offences of forestalling, regrating and engrossing[1] "by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not merely the exercise of one's right to contract for his own benefit, unaccompanied by wrongful motive to injure others, through the means, for instance, of a monopolistic increase in prices."[2]

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[1] Parliamentary protest for the abolition of monopolies was granted by Elizabeth in 1601. Crown patent of monopoly for playing cards was declared illegal in *Darcy* v. *Allen*, (1602) 11 Coke 84; Statute of Monopolies, 1624. In 1689 monopoly by patent of the Crown was abolished.

[2] See *per* Chief Justice White, *Standard Oil Co.* v. *United States*, 221 U.S. 52.

This preoccupation with the consequences of the commercial practices forbidden and the similarity which they bore to the consequences of monopoly led to the classification of forestalling, engrossing, etc., under the generic heading of monopoly.[3]

By a further extension, on account of the burden or restriction which they imposed on the due course of trade, they were also brought under the heading of restraint of trade. Henceforward the question of monopoly is inextricably bound up with the common law doctrine of restraint of trade, one of the fundamental principles of which was that to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his business or trade was void.

At first, all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy and therefore void. It was realized, however, that a rigid rule of this kind, far from advancing the interests of trade, must seriously interfere with transactions of everyday occurrence. Thus the purchaser of a business would have no protection from the seller and an employer no protection from the unfair use by employees of information acquired during their employment. The history of the doctrine is one of progressive and gradual relaxation.[4] The first step was the recognition that a partial restraint might be valid if it was reasonable both from the point of view of the parties and of the public. The doctrine is enunciated in its modern form as follows[5]:

> The true view at the present time I think is this: the public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty may be justified by the special circumstances of a particular case. It is a sufficient justification if the restraint is reasonable—reasonable, that is, in reference to the interests

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[1] Engrossing was the purchase of a large quantity of a commodity for the purpose of selling at an unreasonable price; regrating included every practice or device to enhance the price of victuals, whilst forestalling was the buying of victuals on their way to market in order to sell again at a higher price.

[2] 221 U.S. 52.

[3] See *per* Pollexfen, *arguendo*, *East India Co.* v. *Sandys*, Skinner, 165, 169.

[4] For the classical review and statement of the whole subject see *Nordenfeldt* v. *Maxim-Nordenfeldt*, [1894] A.C. 564, *per* Lord Macnaghten.

[5] *Ibid.* at p. 565.

of the parties concerned *and reasonable in reference to the interests of the public*, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is *in no way injurious to the public*.

An important ground on which a contract may be held contrary to the interests of the public is that it tends to produce a monopoly, which, as we have seen, on account of the similarity of its consequences, was closely identified by lawyers with the old common law offence of engrossing ; and thoughts of this offence seem to have been in the minds of many of the judges when declaring contracts in restraint of trade to be void as tending to a monopoly. Such agreements are usually made by competitors in the same line of business. In these cases the agreement is unlikely to be held void where it is no wider than is reasonably necessary for the protection of the restraining party's business. Lord Parker in reviewing the whole subject of restraint of trade in *Att.-Gen. for Australia* v. *Adelaide Steam Shipping Co. Ltd.*,[1] says :

> Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that which is referred to by Lindley and Bowen, L.JJ. as a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent.[2]

This statement must, however, be read subject to the same learned lord's comment in *North-Western Salt Co. Ltd.* v. *Electrolytic Co. Ltd.*[3] that " it cannot be to the public advantage that the trade of a large area should be ruined by cut-throat competition." So also Lord Haldane said in the same case[4] :

> An ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages and so cause unemployment and labour disturbance.[5] It must always be a question of the circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same is true of a supposed monopoly.

Another form of agreement on the validity of which the courts have had to pass judgment is the price-maintenance agreement, which is a combination of manufacturers, wholesalers, shopkeepers or others for the purpose of eliminating competition or for the maintenance of prices at a certain level. The agreements entered into by the members of such a combination are similar to covenants in restraint of trade entered into by two individuals. They are capable of doing great harm to traders who do not join, who may even be put out of business altogether by the device of the " stop-list." Agreements of this nature were not common before the nineteenth century, and they seem to have been regarded as contrary to the Statute of Monopolies.[1] This view, however, was negatived in 1815,[2] and the *Mogul Case* established incidentally the validity of an agreement in restraint of trade. On the other hand Lord Parker's *dictum* [3] must be borne in mind that such combinations, though reasonable as between the parties, may be held invalid as a " pernicious monopoly " if they tend to enhance prices to an unreasonable extent.[4] But no combination has yet been held invalid on this ground, and it seems doubtful, in view of the modern trend of legislation,[5] whether the courts would ever so decide.

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[1] [1913] A.C. 781.

[2] At p. 796.

[3] [1914] A.C. 461, 480.

[4] At p. 469.

[5] For the effect of this attitude on legislative policy see *infra*. pp. 46 *et. seq.*

A price-maintenance agreement has never been held of itself to be in unreasonable restraint of trade ; on the contrary, the courts lean towards the upholding of such agreements wherever possible. In general it may be said that the only ground on which such agreements may be held in unreasonable restraint of trade is unreasonableness as between the parties,[6] the most common instance of which is a clause restricting the choice of customers.

Machinery is obviously essential for enforcing the rules of these combinations. To this end the weapon of the " stop-list " was created—an extreme form of trade restriction. It is brought into operation immediately a member sells at other than the fixed price. He is placed upon the stop-list, which, thereafter, is circulated among his fellow-members, who are therefore bound not to supply him till he has once more conformed to the rules. This use of the stop-list immediately suggests an action for conspiracy or libel, but it is now well established by two modern cases that no action lies on either ground so long as the stop-list is *bona fide* put to a normal use in the manner described.[7]

So also the levying of a " fine " on a transgressing member has been held valid : *Hardie & Lane Ltd.* v. *Chilton*, [1928] 2 K.B. 306—money so paid is not paid under duress [8] and cannot be recovered.

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[1] *Per* Lord Macclesfield, *Mitchel* v. *Reynolds*, (1711) 1 P. Wms. 181.

[2] *Hern* v. *Griffin*, (1815) 2 Chit. 407.

[3] *The Adelaide Case, supra.*

[4] See also *Vancouver Malt & Sake Brewing Co.* v. *Vancouver Breweries Ltd.*, [1934] A.C. 181.

[5] See *e.g.* Milk Marketing Scheme, 1933.

[6] *Joseph Evans* v. *Heathcote*, [1918] 1 K. B. 418, where a clause prohibiting members from selling to anyone other than a specified list of customers was declared unreasonable on the ground that its effect might be the shutting down altogether of the plaintiff's business.

[7] *Ware & de Freville* v. *Motor Trade Assn.*, [1921] 3 K.B. 40. The question in this case is whether a combination (1) intended to secure that new goods shall be sold at a fixed price neither higher nor lower, by refusing to supply with goods a person who sells those goods at other than the fixed price ; and (2) to inform the confederates who such persons are by means of a stop-list ; and (3) to take steps to ensure that the person who is not to be supplied with goods directly is not to be supplied with them indirectly, is a reasonable and legitimate means of protecting trade interests. In my view it is. While low prices may be good for the public for the time, they are not a benefit if all the suppliers are thereby ruined.—*Per* Scrutton, L.J. For conspiracy see *Sorrel* v. *Smith*, [1925] A.C. 700.

[8] But cf. *R.* v. *Denyer*, [1926] 2 K.B. 258.

Agreements between wholesalers and retailers and between manufacturers and either wholesalers or retailers to maintain price levels are likewise never invalid *per se*. A manufacturer is perfectly at liberty to make what conditions he can on the sale of his goods.[1]

The validity of price-maintenance agreements was emphatically stated in *Palmolive Co.* v. *Freedman* [2] where the absence of any time limit or power of withdrawal was held immaterial.

Throughout the cases there is constantly cropping up [3] the suggestion that there may be a distinction where the covenantee has obtained complete control of an essential commodity. There seems, however, to be little ground for this distinction and, as has been pointed out,[4] " if all the manufacturers of a certain commodity were to agree that they would severally make price-maintenance agreements with all their customers . . . it is almost certain that each agreement would be held valid on the reasoning of the Court of Appeal in *Palmolive Co.* v. *Freedman*."

The Changing Attitude of the Law towards Competition in Business.—We have already seen how, after an initial period of strictness, the common law considerably relaxed the operation of its doctrine of restraint of trade. This relaxation was but a reflection of a general change of attitude towards competition. The latter half of the eighteenth century saw a considerable advancement of commercial development; at the same time social thinkers were developing more accurate economic conceptions which led logically to a change in attitude towards those practices which had been forbidden as harmful, since it came to be recognized that such acts tended, not indeed to restrict, but to fructify and develop trade. Indeed, the repealing Acts of George III proceeded expressly upon the ground that the prohibited acts had come to be considered as favourable to the development of and not in restraint of trade. These Acts mark the inauguration of a movement towards the principle of free and unrestricted competition, subject only to the doctrine of restraint of trade which might invalidate agreements tending to fix prices or control the market. This change of policy is well described in the words of Fry, L.J., in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*[5]: " The stream of modern legislation runs strongly in favour of allowing great combinations of persons interested in trade, and intended to govern or regulate the proceedings of large bodies of men, and thus necessarily to interfere with what would have been the course of trade unaffected by such combinations."

There are in fact two main lines of development in English law; one culminates in the judicial declaration of *laissez-faire* policy, in the words of Lord Morris in the *Mogul Case* [6]:

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[1] *North-Western Salt Co.* v. *Electrolytic Co.*, [1914] A.C. 461; *Dunlop Tyre Co.* v. *New Garage, etc., Co.*, [1915] A.C. 79.

[2] [1928] Ch. 264.

[3] See *e.g. per* Lawrence L.J., in the *Palmolive Case*, at p. 281.

[4] Gare, *Covenants in Restraint of Trade*, (1935), p. 116.

[5] (1889) 23 Q.B.D. at p. 630.

[6] [1892] A.C. 25, 50.

> I entertain no doubt that a body of traders, whose motive object is to protect their own trade, can combine to acquire, and thereby in so far to injure the trade of competitors, provided they do no more harm than is incident to such motive object, and use no unlawful means. . . . Competition is the life of trade and I am not aware of any stage of competition called " fair " intermediate between lawful and unlawful. The question of " fairness " would be relegated to the idiosyncrasies of judges. I can see no limit to competition, except that you shall not invade the rights of another.

On the other hand the courts were inclined to regard certain acts as unreasonable and unfair, and they would not enforce any agreement in unreasonable restraint of trade.

It is a commonplace of legal history that legal development tends to take place in cycles, of which the best-known example is the succeeding periods of strict liability and fault liability in tort. A similar tendency is noticeable in the law relating to business competition, and it is not surprising to find in the nineteenth century a tendency to arrest the movement towards unrestricted freedom in business. The courts began to show a greater inclination to regulate the conduct of business firms towards rivals more specifically and rigorously. The result is the greater prominence which has recently been given to that part of the law which has been designated by American lawyers as the " law of unfair competition." The old unquestioning confidence in free competition was on the wane and was supplanted by the judgment of business practices upon the ground of ethics and expediency.[1] Thus the law relating to trade marks is largely an outcome of developments of the last half of the nineteenth century and, as has been pointed out,[2] the conscious regulation of unfair competition as distinct from the law of trade marks has come in the last fifty years.

Activities of the Courts in the Regulation of Competition.—1. *Inducing a breach of contract.*—Where a customer is under contract to deal with a particular merchant a second merchant in order to compete successfully must induce the customer to break his contract with the first merchant. The result is a clearly-defined and established right of action for the inducement of a breach of contract : *Lumley* v. *Gye*.[3]

2. *Passing off, fraud, etc.*—The second case is where a customer is in fact dealing with a particular merchant, but is under no contract to do so. Here the mere fact that the second merchant induces the customer to transfer his custom to himself is no wrong ; what must be attacked is the method by which that transfer is induced. The customer is open to all, but unfair methods must not be used to attract him.

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[1] Watkins, *The Change in Trust Policy*, 35 H.L.R. 831.

[2] Chenevard, *Traité de la Concurrence déloyale en matière industrielle et commercielle*, p. 24.

[3] 2 E. & B. 216 ; see also *Exchange Telegraph Co.* v. *Gregory*, [1896] 1 Q.B. 147. It was at first thought that an intention to injure was an essential ingredient of the cause of action. This view was emphatically negatived in *Quinn* v. *Leathem*, [1901] A.C. 495, 510, *per* Lord Macnaghten.

In the first place competition must not be carried on by fraud. This principle is at the basis of the tort of "passing off."

> To sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person is a wrong actionable at the suit of that other person. . . . The law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false and misleading devices, the benefit of the reputation already achieved by rival traders.[1]

This wrong may take several forms, the most important of which are[2]: (*a*) A direct statement that the merchandise or business is that of the plaintiff.[3] (*b*) Trading under a name so closely resembling that of the plaintiff as to be mistaken for it by the public.[4] (*c*) Selling goods under a trade name already appropriated for goods of that kind by the plaintiff, or under any name so similar thereto as to be mistaken for it.[5] (*d*) Selling goods with the trade mark of the plaintiff or any deceptive imitation attached to the goods.[6] (*e*) Imitating the get-up or appearance of the plaintiff's goods so as to deceive the public.[7] (*f*) Selling second-hand goods as new goods manufactured by the plaintiffs.[8]

Secondly, competition may not be carried on by the disparagement of a competitor or his goods. It is an actionable wrong maliciously to make a false statement respecting any person with the result that other persons deceived thereby are induced to act in a manner which causes loss to him. There are various forms of this wrong which are usually grouped under the following headings: (*a*) Slander of title: a false and malicious denial of the plaintiff's title to property. Thus the statement that the goods of a trader are an infringement of a copyright or patent, whereby his business is affected, is actionable, at the suit of that trader.[9] (*b*) Slander of goods: a false and malicious depreciation of the quality of the merchandise manufactured and sold by the plaintiff.[1] No action will, however, lie for a mere statement, however false or malicious, by one trader that his goods are better than those of his rival.

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[1] Salmond, *Law of Torts*, 8th ed., p. 615; and see *Samuelson* v. *Producers' Distributing Co. Ltd.*, [1932] 1 Ch. 201.

[2] *Ibid.*, pp. 616 ff.

[3] *Lord Byron* v. *Johnston*, (1816) 2 Mer. 29.

[4] *Manchester Brewery Co.* v. *N. Cheshire, etc., Brewery Co.*, [1899] A.C. 83; *Pinet & Cie.* v. *Maison Louis Pinet*, [1898] 1 Ch. 179; *Taussaud* v. *Tussaud*, 44 Ch. D. 678.

[5] *Wotherspoon* v. *Currie*, L.R. 5 H.L. 508; *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, [1907] 2 Ch. 312. But not a merely descriptive as opposed to a trade name: *Reddaway* v. *Banham*, [1896] A.C. 199; *Liebig's Extract of Meat Co.* v. *Hanbury*, (1867) 17 L.T. (N.S.) 298.

[6] This right of action is concurrent with any rights under the Trade Mark Acts, 1905 to 1919.

[7] *Massam* v. *Thorley's Cattle Food Co.*, (1880) 14 Ch. D. 748; *William Edge & Sons Ltd.* v. *William Nicholls & Sons Ltd.*, [1911] A.C. 693.

[8] *Gillette Safety Razor Co.* v. *Franks*, (1924) 40 T.L.R. 606; cf. *Champagne Heidsieck & Cie. Ltd.* v. *Buxton*, [1930] 1 Ch. 330.

[9] *Smith* v. *Spooner*, (1810) 3 Taunt. 246; *Malachy* v. *Soper*, (1836) 3 Bing. N.C. 371, and cases cited in Salmond, *Torts*, 8th edn., p. 613, n. (*g*).

Thirdly, competition may not be carried on by coercion. It is obvious that to induce a man to break his contract with another or do some other unlawful act against him is actionable at the suit of that other; *a fortiori* an action will lie where that inducement takes the form of intimidation and threats. More difficult considerations arise where a person is constrained to do an act which he has a legal right to do. Thus, where A brings pressure to bear on B's customers to the end that they shall cease to deal with B (this being obviously within their legal right), does this circumstance give B any cause of action? It has long been established that where the intimidation consists in a threat to do or procure an illegal act then an action will lie at the suit of the third party who is injured thereby. So in *Tarleton* v. *McGawley*[2] the master of the ship *Bannister* was trading with the natives on the coast of Africa; and the master of a rival ship, the *Othello*, put an end to that trade by firing on the natives in their canoe. An action was successfully brought against the master of the *Othello* for the loss thus sustained by the owners of the *Bannister*.

The real difficulty arises where the means employed do not involve a threat of illegal action. It may now be considered as established that intimidation of this kind is not actionable unless it is the act not of a single individual but of two or more persons acting together in pursuance of a common intention, *i.e.* when the intimidation assumes the form of a conspiracy. This branch of the law has been the subject of considerable controversy, and of sharp judicial conflicts which cannot be entered into at any length here.[3] The conclusions which may be drawn from the "conspiracy" cases[4] are summarized in the judgments of Bankes and Atkin L.JJ., in *Ware & de Freville* v. *Motor Trade Assn.*[5] A person who procures another to do an act whereby a third party is damaged will only incur liability to that third party (*a*) if the act procured is itself an actionable wrong as between the third party and the immediate actor; or (*b*) where the act is not such a wrong, if the actor was induced to act as he did by unlawful means, which will include fraud and coercion, but not mere threats [1]; or (*c*) if the plaintiff can show that the damage resulted from a conspiracy by several defendants to injure him.

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[1] *White* v. *Mellin*, [1895] A.C. 154; *Alcott* v. *Millar's Karri Forests Ltd.*, (1905) 91 L.T. 722.

[2] (1793) 1 Peake 270.

[3] The subject has been fully dealt with in the following works: Salmond, *Torts*, 8th ed., pp. 626 ff.; Smith's *Leading Cases*, I, pp. 314 ff.; Haslam, *The Law Relating to Trade Combinations*, Ch. II, pp. 20–64; Kennedy, *The Right to Trade*, pp. 93 ff.

[4] The most important of this group of cases are: *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25; *Allen* v. *Flood*, [1898] A.C. 1; *Quinn* v. *Leathem*, [1901] A.C. 495; *Sorrell* v. *Smith*, [1925] A.C. 700; *Ware & de Freville* v. *Motor Trade Assn.*, [1921] 3 K.B. 40; *Giblan* v. *National Amalgamated Labourers' Union*, [1903] 2 K.B. 600; *Pratt* v. *British Medical Association*, [1919] 1 K.B. 244.

[5] [1921] 3 K.B. 40, 56, 84, 91.

The general attitude of the courts, then, is to leave full play to competition in business and only to step in and interfere when there is evidence of a purely malicious motive to injure another trader. In the words of Lord Parker of Waddington :

> The right of the individual to carry on his trade or business in the manner he considers best in his own interest involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others.[2]

The protection afforded to the individual trader in contest with hostile combines is thus somewhat of a negative one and dependent upon his establishing a particular mental attitude. Moreover, in the vast majority of cases, the advancement of the interests of the combine will be achieved only by crushing the individual trader. In these cases it would involve a metaphysical abstraction to differentiate between the two motives and to say where the one merged into the other. Further, a legal system which imputes to an offender an intent to bring about the natural and probable consequences of his own acts will find it difficult to make, and having made, to justify, such a differentiation.

The Legislature and Competition.—Although there has been considerable legislation in England respecting trade unions, conferring upon them immunities and privileges, the cognate problem of controlling combinations of capitalists has received but little legislative attention in this country. Thus, as has been said [3] :

> A number of competing establishments might form themselves into a powerful trust or trade association and so secure a virtual monopoly of the home market. They might exterminate all trade rivals by inaugurating an intensive campaign of price-cutting, deferred rebates and tying-clauses. They might then exploit their ill-gotten power and extort from the consuming public exorbitant prices for their goods. And yet the combine would be within the four corners of the law.

This state of the law offers a striking contrast to the legislative expedients which have been adopted in the United States of America, Germany, Canada, Australia and New Zealand, to check the activities of large industrial concerns. This lack of legislative control may partly be explained by the fact that until recent years large-scale industrial combination was not common in this country and British industrialists showed no inclination towards co-operating with rivals at the sacrifice of complete freedom of management.

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[1] *Quaere* whether a threat to commit a civil wrong would amount to " unlawful means."

[2] *Att.-Gen. of the Commonwealth of Australia* v. *Adelaide Steamship Co.*, [1913] A.C. 781, 797.

[3] Haslam, *The Law Relating to Trade Combinations*, p. 136.

Economic changes since the war, and consequent upon the war, caused a modification of this outlook, and it is now accepted that the increased efficiency that is requisite to meet the exigencies of modern intensive competition can only be obtained by industrial combination and amalgamation. The watchword of modern business policy is "rationalization" or the elimination of wasteful competition, an end only to be achieved by the elimination of previously competing units. The probability of this development, and the dangers which might attend it, were recognized by the Ministry of Reconstruction, which in February 1918 set up a committee with the following terms of reference:

> In view of the probable extension of trade organizations and combinations, to consider and report what action, if any, may be necessary to safeguard the public interest.

The Committee in their Report[1] were unanimous in the opinion that it would be desirable to institute in the United Kingdom machinery for the investigation of the operation of monopolies, trusts and combines. They recommended that the Board of Trade should collect information from all available sources as to "the nature, extent and development" of such organizations and present an annual report to Parliament. They further suggested the setting up of a Tribunal, with a lawyer as chairman and consisting of not less than two or more than seven other members selected by him from a representative panel appointed for the purpose by the President of the Board of Trade. On reference from the Board of Trade this Tribunal was to have power to compel the production of all such evidence and information as might be necessary for their investigation and, where injury to the public interest had been proved, to publish a report. The Committee itself recognized that further machinery would be necessary to deal effectively with such abuses, and in an addendum Messrs. Ernest Bevin, J. A. Hobson, W. H. Watkins and Sidney Webb emphasized the inadequacy of the proposals made:

> We feel that it (the Report) does not adequately express the gravity of the situation, and that the proposals fall far short of what will be necessary to safeguard the public interest.
>
> We do not suggest that any action should be taken to prevent or to obstruct combination or association of capitalist enterprise. Apart from the experience that no such interference can be made effective, we have to recognize that association and combination in production and distribution are steps in the greater efficiency, the increased economy and the better organization of industry. We regard this evolution as both inevitable and desirable. It is, however, plain that the change from competitive rivalry to combination calls for corresponding developments to secure for the community both safeguards against the evils of monopoly, and at least a large share of the economic benefits of the better organization of industry which it promotes.

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[1] Cd. 9236.

In view of the admitted moderation of the Committee's proposals it is surprising that no effort was made to put any of their proposals into operation.[1]

The Final Report of the Committee on Industry and Trade [2] also deals with the question of controlling legislation. After a summary of the difficulties of embarking on any immediate legislation the Committee concluded that " the case for immediate legislation for the restraint of such abuses as may result from combinations cannot be said to be an immediate one." [3] But this Committee also favoured the suggestion that the Board of Trade should include among its general duties the watching of the movement towards consolidation and agreement in industry, and the continuous collection of data with regard to various forms of combination. And, " should undesirable features develop in the future to the detriment of the general public," they recommended the institution of an appropriate public authority " with the power to investigate complaints of abuse and monopoly, with the right to require the production of all relevant data."

The fact that no attempt has been made to introduce legislation to give effect to the suggestions of these committees is explicable, it is suggested, on two grounds. In the first place, there is the general disinclination of the Englishman to interfere with the internal business policy of industrial concerns.[4] In the second place, the intensification of foreign competition which had become apparent before the war and was even more marked in the years that followed, made possible by the " open door " fiscal policy of successive governments, inevitably caused a greater emphasis on the importance of leaving traders a free hand in order to secure the benefits of large-scale organization and the elimination of wasteful competition. Public policy in such circumstances must take account of the exigencies of the moment and recognize that it may be more important that the manufacturer shall be able to secure to himself remunerative prices and so maintain his business, than that a misconceived view of the public interest should deny him the opportunity of effective competition and so drive manufacturers out of business, lower wages, and cause industrial unrest.[5]

The great industrial depression which began to manifest itself in this country in the years 1930–1 gave added weight to this change in public policy. The tendency of legislators and governments to frown on large-scale industrial combinations gave place to a benevolent acquiescence and, in many cases, to active assistance. Moreover, the government, in their efforts to assist those industries which suffered in a marked degree from the effects of the depression, have resorted to a delegation of monopolistic control of prices in order to secure adequate remuneration to producers.[1]

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[1] If we except a half-hearted and temporary measure, the Profiteering Act, 1919, which empowered the Board of Trade to investigate cases where the profit on the sales of any article was " in view of all the circumstances unreasonable." Courts of summary jurisdiction were empowered to convict under the Act. It was finally repealed by the Statute Law Revision Act, 1927.

[2] 1929, Cd. 3282, pp. 188–93.

[3] P. 192.

[4] As an exception to this general attitude it may be noted that the Companies Act, 1929, contains provisions as to the particulars that must be given of holdings in subsidiary companies and as to holding companies generally. See ss. 125–7.

[5] See *N.W. Salt Co. Ltd.* v. *Electrolytic Co. Ltd.*, [1914] A.C. 461, *per* Lord Haldane, at p. 469, quoted above, p. 40.

There has been a forcible reminder quite recently that the new attitude towards industrial combines may lead to a conflict of public policies. A syndicate was formed with the object of establishing at Jarrow a new Bessemer steel plant on a large scale. This enterprise had the unofficial backing and support of the government and of the public, since it promised an alleviation of unemployment and distress in a " distressed area." Nevertheless, the scheme was abandoned because of the policy of the Iron and Steel Federation that no new plant should be encouraged to start independently of existing companies. " Again and again," says *The Times*, " there has been an assurance that the Federation has no power to prevent the construction of new works, and must accept the membership of eligible firms. It is true enough ; *but there are other ways of killing a project than those expressly forbidden.*" Speaking in the House of Commons, Mr. Runciman suggested that the social welfare may not have had its proper weight in the decision of the Federation and that in such a case the social welfare ought to have had great influence. Feeling ran high on this issue and an inquiry was ordered into the present position and lines of development of the iron and steel industry, and of the social implications of further developments.

The increasing measure of assistance and protection afforded to industry by the change in tariff policy has gone some way towards relieving industry from the more serious stresses which justified a policy of leaving it the maximum of freedom in organization and combination. It may well be that cognizance will be taken of this change and that there may be devised a scheme of safeguards against those abuses of monopolistic power which have always been regarded unfavourably by the law and are particularly to be feared in the circumstances of to-day.[2]

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[1] An excellent example of this type of government planning is seen in the Milk Marketing Scheme of 1933. For a discussion of this and related subjects see A. W. Rather, *Planning Under Capitalism*, cc. v-xii.

[2] There is a precedent for such regulation in the case of the railways ; when the last comprehensive legislative scheme for the railways was devised they had what was practically a monopoly of the nation's traffic. Consequently they were subjected to considerable regulation for the purpose of safeguarding their customers from unfair treatment. Thus the Acts of 1854 and 1888 contain provisions for securing the trader and customer against undue preference and discrimination. The Act of 1921 regulates the prices that may be charged for the carriage of goods and lays down a classification of goods for charging purposes. Certain sections of the community (*e.g.* workmen) are to be carried at cheap rates. The development of road transport as a keen competitor of the railways has brought a new factor into play since road transport is not subjected to any of these forms of regulation. This has created great dissatisfaction on the part of the railways and some adjustment of conditions seems indicated.

An interesting example of an attempt to regulate a competitive device in the public interest is provided by the Gift Coupons Bill of 1933, which aimed broadly at suppressing the issuing and redemption of certain gift coupons and trading stamps. The Bill was read a second time and was then withdrawn on an undertaking being given to set up a Royal Commission to inquire into those practices. The result of the inquiry is embodied in the Report of the Committee on Gift Coupons and Trading Stamps.[1]

It has long been the practice of producers of certain proprietary articles to issue with their goods coupons which may be presented in specified numerical quantities for redemption in so-called " gift " articles, which were for the most part not produced by the issuers of the coupons. The system proved very popular with the public and very effective in promoting the sales of the articles with which they were issued. The main arguments put forward against coupon trading were: (*a*) That the purchaser of the coupon-bearing article was led to disregard its value and to concentrate on the accompanying gift, in the belief that he is getting something for nothing. The Committee dismissed this argument on the ground that the average man is the best judge of what he is buying and "if he accepts a lower grade of a consumable article it is likely to be because the quality is of less importance to him than the acquisition of the so-called ' gift '."[2] Further, the manufacturers who are interested in maintaining the popularity of their own brands cannot afford to ignore the quality of the goods which are supplied in redemption of coupons. (*b*) The system of gift coupons involves the setting up of a secondary system of distribution destroying the trade of the retailer of the goods given away. The Committee pointed out that any direct loss to the retailer must be comparatively small and likely to be compensated to some extent by possibly unrecognized gains in other directions (*e.g.* sale of accessories for goods given away).

It was further urged against the system that its spasmodic nature disturbed normal trading, as a retailer who has laid in a stock of particular goods might find that the same goods were to be distributed as gifts and therefore could not be sold except at great loss. But similar and more far-reaching disturbances to the ordinary retailer are caused by the mail-order business of large multiple stores or the low prices of fixed-price stores or chain stores. A more weighty argument was that the system leads to the setting up of coupon exchanges or agencies solely concerned with the sale of coupons, by means of which a man is enabled, by the purchase of coupons, to buy the goods for which they are exchangeable at much below the retail price, without ever having bought the coupon-bearing goods.

The arguments in favour of the system found more favour with the Committee. In the first place " the gift coupon method of advertising has the merit of putting something back into the consumers' pocket ; and

[1] 1933 : Cd. 4385.

[2] P. 6.

we believe that on the whole the public get a more direct return from gift coupons than from many other forms of advertising."[1]

Secondly, gift coupons as a method of advertising are relatively cheap, and within the reach of small and new concerns.[2] Moreover they provide a method of passing on price fluctuations to the consumer. The final conclusion of the Committee was that the gift-coupon system is not detrimental to the public interest.

The other practice to which the Committee were referred, the trading-stamp system, is the retailer's equivalent of the coupon. Stamps are given to the customer in proportion to the amount spent, and are stuck by him into a collecting book with which he is provided by the retailer. When the book is full the stamps may be tendered in exchange for a gift. The system takes several forms : (i) A retailer may operate his own trading-stamp scheme ; (ii) A group of retailers may combine to issue trading stamps ; (iii) A trading-stamp company may sell collecting books and stamps to retailers. The stamps are either exchangeable for goods of the retailer (in which case the latter pays a fixed sum to the stamp company), or for goods supplied by the trading-stamp company.

The arguments put forward against this form of trading were substantially similar to those against coupon trading. The Committee found that neither the system itself nor the trading-stamp organizations promoted to give effect to it, if conducted with integrity, were detrimental to the public interest. One member of the Committee[3] declined to accept the general conclusion in respect of trading-stamp companies unless they were constituted by retailers. He was apprehensive of the growth of independent companies strong enough to impose on retailers the costs of a stamp system of which the profits go elsewhere.

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[1] P. 10.

[2] " In our view it would be detrimental to the public interest to discriminate by law against methods of trading which are specially favourable to new producers" (p. 11).

[3] D. H. McGregor.

A COMPARATIVE STUDY OF THE ANTI-TRUST LAWS OF THE BRITISH DOMINIONS AND OF THEIR ADMINISTRATION, II.

[*Contributed by* PHILIP STRICKLAND, ESQ., B.A., LL.B.]

II. AUSTRALIA

Constitutional Authority.—Australia, unlike Canada, is handicapped in the making of suitable anti-trust laws by the division of powers between State and Commonwealth under the Commonwealth of Australia Constitution Act of 1900.[1]

S. 51 of the Constitution Act provides: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) Trade and commerce with other countries, and among the States; (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

S. 107 provides: "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

S. 101 provides: "There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all the laws made thereunder."

In view of these sections, it may be said that the Parliament of the Commonwealth has power to legislate concerning Inter-State trade and commerce only.[2]

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[1] 63 & 64 Vict., c. 12, *Laws of the Commonwealth*, 1901–31, vol. i, p. 3.

[2] It is questionable whether lack of constitutional authority to regulate intra-State commerce may be considered any great handicap. In Australia a large portion of commerce is intra-State. But anti-trust laws are aimed at large combinations, and should these arise in Australia, probably business will have become largely inter-State. In the United States, for example, where Congress has power over inter-State commerce only, a Federal Trade Commission has been set up (1914, c. 311, The Federal Trade Commission Act), which has been given powers of investigation and publicity similar to those given to the administrators of the Canadian Combines Investigation Act of 1923 (App. 2). The Federal Trade Commission has, since 1919,

The Australian Industries Preservation Act of 1906.—In 1906 the Parliament of the Commonwealth passed an Act known as "The Australian Industries Preservation Act of 1906." There were at that date in Australia subsidiaries of four huge American trusts: the International Harvester Co., then having a capital of $120,000,000; the Standard Oil Trust, then controlling $98,000,000; the Steel Trust, then controlling $2,000,000,000; and the Consolidated Tobacco Company, then controlling $186,000,000. These trusts, with the exception of the International Harvester Co., which had been kept under control by strong competitive interests, were in a more advantageous position than their competitors because of their affiliations. There were no trusts of any size in Australia apart from the above four. The purpose of the Australian Industries Preservation Act was to prevent the admission of foreign trusts into Australia and the growth of those already existing within the country, and to eliminate the possibility of formation of wholly Australian trusts.[1]

Before use was made of the Industries Preservation Act, it was amended by Acts of 1908 and of 1909.

The machinery set up by the Australian Industries Preservation Act of 1906–9 differs fundamentally from that established under the Canadian Combines Investigation Act of 1923. Both provide for investigation. The Australian Act differs in that it makes no provision for publication of the facts discovered by investigation. It relies solely on prosecution for enforcement of its provisions. Thus while in Canada the nature of an offence under the Act is relatively unimportant, in Australia it is paramount. Successful prosecution depends on the provisions of the Act relating to the nature of an offence against the Act, and on the powers of investigation given to administrators for the collection of the necessary evidence to establish that such offence has been committed. A discussion of the method of operation of the Act is divisible into these two important topics.

The Collection of Evidence.—The collection of evidence concerning combinations is provided for by ss. 15*b* and 15*c* of the Act. The validity of these sections was questioned in the first case to be prosecuted, that of

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been active, conducting investigations in almost every field of industry. Its activity is enabled because industry in the United States, since the growth of business interests into huge chain-systems, almost invariably is inter-State in some of its aspects.

In Australia, a board of investigation has been set up, without power to make orders, or to use publicity as a means of enforcement. This board is known as the Inter-State Commission, discussed, note 3, p. 54.

[1] Mr. Isaacs, the Attorney-General for the Commonwealth, who helped to draft the Bill, stated that it was aimed at the suppression of all monopolies and combines except those carried on by an individual or individuals within a State. He thought corporations acting within a State would fall within the legislative jurisdiction of Parliament under s. 51 (xx) of the Constitution Act, *supra*, p. 52. But see *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead*, 8 C.L.R. 330, discussed *infra*, p. 54.

Huddart, Parker & Co. Pty. Ltd. v. *Moorehead.*[1] The Comptroller-General of Customs, by authority of s. 15*b*, called upon Huddart, Parker & Co., and upon their manager, Appleton, to answer certain questions. The defendants claimed that s. 15*b* was *ultra vires* the Parliament of the Commonwealth, and that the power given to the Comptroller-General was "judicial power" which by s. 71 of the Constitution Act[2] was vested in the courts. The only other question was whether s. 15*b* gave powers amounting to an inquiry within s. 101 of the Constitution Act, and if so whether under s. 101 such power was given exclusively to the Inter-State Commission.[3] The High Court of Australia held that no judicial power was involved, and that the inquiry under s. 15*b* did not amount to an inquiry under s. 101 of the Constitution Act, and that even if it had, such power of inquiry was not vested exclusively in the Inter-State Commission by that section. The validity of s. 15*b* was upheld.

The holding of the court is of considerable importance to the facility of administration of the Act. A great problem of legislators in the enactment of anti-trust laws is to provide suitable machinery for investigation of combinations. By s. 15*b* of the Industries Preservation Act the Comptroller-General is constituted a board of investigation to receive complaints and conduct the investigation. His functions are much the same as the combined functions of the Registrar and the appointed Commissioner under the Canadian Combines Investigation Act of 1923. Without such board experience in Canada has been ample demonstration that combines cannot be brought to trial, for if the establishment of evidence be left to the complainant the expense involved will prevent the filing of many just complaints, and if it be left to ordinary examination of witnesses in court a case would seldom be established, since even considerations which may be outside the defendant's knowledge, as the condition of the industry as a whole, must be taken into account in considering whether the combination is operating to the public detriment.

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[1] 8 C.L.R. 330, 1909. Huddart, Parker & Co. were charged with offences against ss. 5 and 8 of the Industries Preservation Act. They claimed that s. 51 (xx) of the Constitution Act, *supra*, giving Parliament of the Commonwealth power to make laws respecting "Foreign corporations, and trading and financial corporations, formed within the limits of the Commonwealth," did not extend to the governance and control of such corporations when lawfully engaged in domestic trade within a State. The court held that had intra-State trade been interfered with incidentally to the execution of a Federal power, or by legislation ancillary to a valid Federal Act, it would have been *intra vires* interference. But, the court held, this was an attempt to use the Federal power to pierce the cloak surrounding the field of State jurisdiction. The power exercised in the enactment of ss. 5 and 8 belongs exclusively to the States, and therefore the court held these sections to be *ultra vires*.

[2] S. 71 of the Constitution Act (63 & 64 Vict. c. 12) provides: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

[3] The Inter-State Commission Act (*Laws of the Commonwealth*, 1901–31, vol. 2, p. 1495) provides for a board to investigate Australian Industries among other matters, the board to be appointed by the Governor in Council.

S. 16 of the Act provides: "The Commission shall be charged with the duty of investigating, from time to time, all matters which in the opinion of the Commission ought in the public interest to be investigated affecting: (*a*) the production of and trade in commodities; (*e*) prices of commodities; (*f*) profits of trade and manufacture."

S. 48 provides: "The Commission may publish such information relating to any matter investigated by it as it thinks fit."

The following sections of the Act give to the Commission wide powers with regard to the taking of evidence and the demanding of answers to questions.

In the Act as originally passed, there were provisions allowing the Commission to grant damages and injunctions against offenders. These provisions were held unconstitutional in the case of *The State of New South Wales* v. *the Commonwealth*, 21 Argus L.R. 128.

The extent of the power of investigation vested in the Comptroller-General by s. 15*b* of the Industries Preservation Act was determined in the case of *Melbourne Steamship Co.* v. *Moorehead*,[1] an appeal from a conviction by a police magistrate on a charge of failing to answer certain questions put to the appellants, members of the Steamship Co. A prosecution under the Act had already been instituted in the High Court of Australia against members of the coal-shipping combination. The Melbourne Steamship Co. was not included among the defendants to that prosecution. The questions put were to ascertain that company's connexion with the coal-shipping combination. The High Court, in allowing the appeal of the Melbourne Co. in this case, held that the institution of proceedings by the Attorney-General transferred jurisdiction with regard to all matters concerning the combine to the court, and terminated the power of the Comptroller-General to conduct preliminary inquiry under s. 15*b*. The court held that the Comptroller-General could have asked questions dealing only with the Melbourne Co., but could not ask questions to elicit information to be used against the defendants against whom prosecution was pending.

Thus investigation under s. 15*b* may be considered preliminary inquiry rather than court procedure. Though the point has never been in issue, it follows that the court has power to reach a different conclusion as to the facts than that of the Comptroller-General. The findings of the Comptroller-General, if prosecution results, are introduced as evidence, but are not conclusive, and may be contradicted by the weight of evidence submitted at the trial.

The value of investigation under s. 15*b* is indicated by the evidence brought to light by the Comptroller-General as a result of inquiry in the case of *Huddart, Parker & Co.* v. *Moorehead*,[2] which led to the prosecution of the Associated Northern Collieries.[3]

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[1] (1912) 15 C.L.R. 341.

[2] 8 C.L.R. 330, 1909, *supra*.

[3] *Attorney-General for the Commonwealth* v. *Associated Northern Collieries*, (1912) 14 C.L.R. 387.

The Nature of an Offence against the Act.—What acts shall constitute an offence against the Industries Preservation Act of 1906–9 are set out in ss. 4, 7, *7a*, *7b*, 9 and 10. Ss. 4 and 7 were first utilized in the conviction of Appleton, manager of Huddart, Parker & Co. Appleton was convicted by a police magistrate, and on appeal did not argue that he had committed no offence against ss. 4 and 7.[1] Ss. 4, 7, 9 and 10 have been judicially interpreted in the decisions on trial and on two appeals in the prosecution of the Vend-shipping combination, a sequel to the prosecution of Huddart, Parker & Co.[2] The trial of the combination, in accordance with the provisions of the Act, was conducted before a single judge of the High Court of Australia.

The material words of s. 4 are "with intent to restrain trade or commerce to the detriment of the public." The intent must be real and not merely imputed. Mere words of the defendant used perhaps for another purpose would not be sufficient to prove the necessary subjective condition of his mind as to constitute intent under the Act.[3] Judge Isaacs found intent to be inferrable from (1) the probable consequences of the combination, (2) the actual effects, (3) pre-combination conduct, and (4) conduct during the time of operation of the combine. With regard to the probable results, he said that no one acquainted with the facts, and who thought for an instant, could have any doubt that the result of the combination and its operations would in all probability be to bring about the detrimental consequences which he found to exist, namely, high prices to the public and suppression of competitors. As to the actual effects, it was held that each of the parties to the contract knew what the other was doing throughout, and must have intended to raise the price and suppress competitors, which in fact did happen. As to conduct before and during combination, Judge Isaacs found such intent to be inferrable from the various attempts of the Vend members to make some provision in the Vend agreement which should allow them to eliminate outside competitors, and from post-agreement methods taken to bring about this result without disclosing to the public that no competition existed between the members. This was done by means of sham tenders by more than one member of the shipping companies for transport shipments.

In interpreting s. 7, Judge Isaacs said that "monopoly" as used in the Act means the same thing as it does at common law, which includes the prevention or destruction of all reasonable and effective competition, the natural and commercial safeguard of the public. Here the defendants were found to have "monopolized or attempted to monopolize." Since the defendants had already been found to have done certain acts with intent to injure the public, Judge Isaacs found them guilty under s. 7 as well as under s. 4.

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[1] *Appleton* v. *Moorehead*, (1909) 8 C.L.R. 330.

[2] *The King and the Attorney-General of the Commonwealth* v. *the Associated Northern Collieries*, (1912) 14 C.L.R. 387. It is worthy of note that trial in this case was before Judge Isaacs, who at the time of the proposal of the Industries Preservation Act in Parliament was the Attorney-General of the Commonwealth, and explained the Bill and requested its support from the Members of Parliament.

[3] Judge Isaacs held that "The intent aimed at is not the intent expressed in the contract—if the contract be the act complained of—it is the actual intent of the defendant, of which the contract is excellent evidence to begin with, because a man's real intent may generally be gathered from what he says as well as from what he does. Further, a man is deemed to intend the natural consequences of his act."

All of the defendants, said Judge Isaacs, obviously fell within s. 9, as aiding and abetting each and all of their fellow members. The defendants were all convicted under ss. 4, 7 and 9 of the Act, and an injunction granted against further offence under s. 10.

An appeal from this decision was taken by the Adelaide Steamship Co. to the High Court of Australia.[1] The High Court held that there must be not only intent to do the acts, but intent to cause detriment to the public. Further, this detriment must affect not only one part of the public, but the public having due consideration for the interests of producers, consumers and workers. Thus, said the High Court, it would be insufficient to show detriment to consumers alone, since if we consider producers and workers as well, it might still be said that the acts were beneficial to the public as a whole. The court found that since the Act recognized that an innocently made combination might turn out to be detrimental to the public, by providing for injunction in s. 10 without including charges under ss. 4 and 7, therefore s. 4 should be interpreted to demand actual and not constructive intent, though actual intent includes cases where the circumstances show that there must have been intent. The same argument was applied to s. 7. The High Court decided that though there might be two or three instances in which the acts of the defendants did cause detriment to parts of the public, it was probably beneficial to the public as a whole, and that therefore there could not be said to be intent to cause detriment within the meaning of the term as used in the Act. Since there was neither actual detriment nor intent to cause detriment, there could be neither injunction under s. 10 nor conviction under ss. 4, 7 and 9.

From this decision the Attorney-General of the Commonwealth appealed to the Privy Council.[2] Their Lordships in interpreting the words "monopolies" and "monopolize" as used in s. 7 determined that these words do not refer to monopoly in the strict legal sense of a grant from the Crown. Lords Lindley and Bowen, in the case of *Nordenfelt* v. *Maxim Nordenfelt*,[3] contemplated a state of circumstances in which some trade or industry has passed or is likely to pass into the hands or under the control of a single individual or group of individuals, and indicated that if a restraint on trade is likely to produce this result, it may on grounds of public policy be unenforceable however reasonable in the interests of the parties to the contract. Such a set of circumstances, however, may, by eliminating competition, entail the evils thought to be incident to monopoly rights granted by the Crown, and may therefore in a popular sense be called a monopoly.[1] The Act in using "monopoly," said their Lordships, does so in this popular sense. Their Lordships found that since these monopolies were simply unenforceable at common law, and not criminal, and since the Act involves intent in order to make the results produced by a monopoly criminal, therefore the Legislature must have intended in passing the Act that there should be proof of something more than such detriment as would render the contract unenforceable at common law. The proof of detriment as a fact may be excellent evidence of intent to cause that detriment, but is not sufficient to prove such intent in itself.

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[1] (1912) 15 C.L.R. 65.

[2] [1913] A.C. 781 (case actually heard in 1912).

[3] [1894] A.C. 535.

Thus neither the doing of detrimental acts nor the intent to do acts which are detrimental is sufficient to constitute an offence under ss. 4 and 7. The offender must have as a purpose the intent to harm the public. There must be something like actual malice in his mind at the time of the commission of the act or acts.

Under s. 15*a* the prosecutor may allege the acts which he claims have been done, and they shall be deemed proven unless evidence be produced to the contrary. But this does not extend to the intent to cause detriment to the public. The onus is on the Crown to prove that intent. In this case the Crown failed to prove intent to injure the public, or to show that the combination was actually against the interest of the public as a whole. There can be no conviction under ss. 4 and 7, and no injunction under s. 10.

Effect of the Vend Decision.—Before the prosecution of the coal-shipping combination, it was thought that the Act would operate to make the law more stringent than the common law, both by increasing the scope of unenforceable contracts and combinations, and by making them actually illegal and punishable rather than simply unenforceable. Actually the Act had a different but no greater effect than the common law. At common law there could be a criminal charge of conspiracy in case of a combination actually formed to cause harm to another in his trade, though this charge has, as we have seen, become practically obsolete. There could also be injunction and damages granted. In cases of suit *inter sese* and a finding of unreasonable restraint the court would simply declare that the contract was unenforceable. After the Vend decision, under the Australian Act, in order to gain a conviction under s. 4 or s. 7, the Crown had the almost impossible task of proving sinister intent on the part of the defendant to cause detriment to the public; not merely one factor of the public, as to consumers, but to the public as a whole, including producers, consumers and workers.

The Vend agreement would have been enforceable at common law, because the court found that it was reasonable under the circumstances surrounding the crippled industry. But even had it been found to be unreasonable restraint, and hence unenforceable at common law, the only possible remedy under the Statute would have been injunction under s. 10, because there would still have been lacking the evidence necessary to prove intent under s. 4 or s. 7.

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[1] Accord; Farwell L.J., in *North-Western Salt Co.* v. *Electrolytic Alkali Co.*, 107 L.T. 439.

Interpretation of ss. 7a and 7b.—Ss. *7a* and *7b* have never been used for purposes of prosecution, and therefore have not been judicially interpreted. Under s. *7a* no offence has been committed unless there be detriment to the public, but under s. *7a* (3) lack of detriment is an affirmative defence, and the onus is thrown on the alleged offender to prove that his behaviour has not been detrimental to the public.[1] It is improbable that the courts would require proof that the acts of the alleged offender had in no instance resulted in detriment to the public. It is more likely that the courts would apply by analogy a principle established in the Adelaide Steamship case.[2] It was admitted in that case that in two or three instances there was detriment to the public which might, if considered alone, support injunction under s. 10. But it was held that considering the public as workers, consumers and producers, detriment as used by the Legislature was intended to mean recurrent detriment. Those acts which are detrimental to the public must be considered sufficient to outweigh those which are beneficial in order to maintain that the combination performing the acts is operating to the detriment of the public as a whole. Thus under s. *7a*, if a rebate offered be proven by the defendant not to be detrimental to the public in substantially all instances, the courts would undoubtedly find that such defendant had established a good defence.

Under s. *7b*, boycotts are forbidden absolutely, regardless of their effect upon the public. Boycotts seem to be considered in Australia to be *per se* bad trade policy.

Ss. *7a* and *7b* of the Industries Preservation Act, being limited to specific acts, have application only in a small field, and cannot be said to affect to any extent the content of the Act. Thus in determining the nature of an offence under the Act, ss. 4, 7 and 10 are the important sections, and these have been shown to be of little or no effect in the suppression of combines. The difficulties encountered in prosecuting under these sections were anticipated after the commencement of proceedings against the Vend-shipping combine, and the Legislature passed an Act to amend ss. 4, 7 and 10, in 1910 (App. 3).

The Nature of an Offence under ss. 4, 7 and 10 as amended by Act No. 29 of 1910.—The amendment of 1910 alters the content of s. 4 (1)*a* by providing that it shall be an offence to combine in restraint of trade without intent to restrain, and a separate offence to combine with intent to restrain, whether or not restraint results. In the former case the restraint will suffice to establish the offence; in the latter, intent. Subs. (3) of s. 4 provides that it shall be a defence to s. 4 (1)*a* if the alleged offender *prove* that the restraint caused or intended was not to the detriment of the public and was not unreasonable. Thus detriment to the public is no longer an element of the offence. It has been extracted from the offence and has been constituted an affirmative defence which must be proven by the party alleging it, the defendant. If the defendant proves that there was in fact no unreasonableness and no detriment to the public, he shall have established an affirmative defence to an allegation of offence under s. 4 (1)*a*.[1]

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[1] See discussion of s. 4 (3), *infra*, p. 59.

[2] *Supra*, note 2, p. 57.

S. 15*a* must be read together with each of the sections dealing with the nature of an offence under the Act. It does not shift the burden of proof to the defendant, but merely requires him to introduce some affirmative evidence to rebut a presumption as to the facts. If the Attorney-General alleges certain acts to have been done by the defendant and the defendant in answer introduces affirmative evidence to the contrary, the burden to prove such facts shall rest on the Attorney-General. S. 15*a*, since it relates merely to evidence and procedure, was held to be applicable in the Adelaide case, even though it was enacted subsequent to the commencement of proceedings in that case. It was held by their Lordships that the Attorney-General was entitled to state the facts and rely on s. 15*a* to establish a presumption as to their truth, but that if the Attorney-General introduced affirmative evidence to prove the facts, as he had done in that case, the case must be tried on its merits, and s. 15*a* would cease to have application.

Under s. 4 (1)*b* of the 1910 amendment (App. 3) it is an offence to combine " to the destruction or injury of, or with intent to destroy or injure, by means of unfair competition, etc." As in s. 4 (1)*a*, destruction or injury is one offence, and intent to destroy or injure a separate offence. Under s. 4 (1)*b* no provision is made that it shall be a defence if the defendant proves that there was no detriment to the public. Any destruction or injury of a desirable trade is considered to be *per se* detrimental to the public.

S. 4 as amended is similar to the common law in its definition of an offence. Acts which are unreasonable as between the parties or are detrimental to the public, and which are done by combination in restraint of trade, are unlawful. The effect of s. 4 is to require the defendant to prove that no detriment exists, and that the restraint or intent to restrain is not unreasonable in the circumstances. S. 4 is stronger than the common law in that under it mere intent is an offence, and in that it provides a penalty for the offence.

S. 7 (1) of the Act was amended in 1910 by the omission of the words " with intent to control, to the detriment of the public, the supply or price of any service, merchandise or commodity." Under the section as it now stands, not only is it an offence to combine or conspire to monopolize, but it is an offence for an individual to monopolize or attempt to monopolize. The section has application to combinations or individuals who achieve a monopolistic position whether or not they do so by unfair competition or by any affirmative act. Any combination or individual who by any means whatsoever acquires a monopoly is guilty of an indictable offence; the stringency of s. 7 is somewhat alleviated by s. 7 (3), which provides that the Attorney-General may bring suit by civil action before a justice of the High Court for the penalties provided. Thus an innocent man or combination, having gained a monopolistic position, may escape indictment, but is liable to a penalty by civil action.

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[1] See discussion of s. 7*a* (3), *supra*, p. 59.

S. 10 (1) is worded exactly as is s. 4 (1), with the exception that under s. 10 intent to restrain trade or destroy or injure industry cannot be restrained. Although the Australian Parliament made intent an offence against s. 4 (1), they did not attempt to impose injunctive procedure against this state of mind. No provision is made in s. 10, however, to the effect that the defendant may escape the terms of the Act by proving that his acts are not detrimental or unreasonable. It seems to have been the intent of the Legislature in enacting ss. 4 and 10 to prevent any restraint of trade or commerce, whether or not reasonable or detrimental to the public, and to provide a penalty as well if the restraint should be to the detriment of the public or unreasonable in the circumstances.

There have been no prosecutions of combinations in restraint of trade in Australia since the amendment of 1910 (App. 3), and hence no judicial interpretation of the meaning of the sections. The procedure for investigation has remained unchanged, but the nature of an offence under the Act has been so altered that prosecution or injunction is applicable to any restraint on trade, or any intent to restrain trade to the detriment of the public or in such a way as to be unreasonable, and to any monopoly or attempt to monopolize any Australian industry the preservation of which is desirable. Such restraint, intent to restrain, or monopoly or attempt to monopolize must deal primarily with inter-State trade or commerce. Subject to this limitation, the provisions of the Act are extremely strict.[1]

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[1] The Industries Preservation Act of 1906–10 is the only Australian Act purporting to cover the whole field of restraints on trade. There has been one other enactment designed to protect the public from detrimental restraints, namely the Tariff Board Act of 1921–9.

The Tariff Board Act provides for the appointment by the Governor-General of a board consisting of four persons. This body, under s. 15 (1) of the Act, shall inquire into: (*h*) any question as to whether a manufacturer is taking undue advantage of the protection afforded him by the tariff, and in particular in regard to his (1) charging unnecessarily high prices for goods; or (2) acting in restraint of trade to the detriment of the public; or (3) acting in a manner which results in unusually high prices being charged to the consumer for his goods; these matters to be referred to the Board for investigation by the Minister of Customs.

Under s. 15 (3), if the board finds on inquiry in respect of any question referred to it in paragraph (*h*) of subs. (1), that a manufacturer is taking undue advantage of the protection afforded him by the tariff, it may recommend (*a*) that the protection afforded the manufacturer in respect of goods be reduced or abolished; or (*b*) that such other action as the board may think desirable be taken; but in so recommending, it must take into account the conditions in the industry as a whole.

III. NEW ZEALAND

Necessity for Legislation.—New Zealand, though a small country, and one in which industry has not developed to such an extent as to threaten the public with oppressive trusts, is rich in agricultural products, and has found it necessary to protect by legislation the consumer and producer from combination by the all-powerful middleman. In agricultural products, which are produced necessarily by the farmer or grower as an individual, there is invariably some middleman who buys the product from the farmer and distributes it in its various forms to the consumer. These middlemen are in the unique position of purchasing in the aggregate substantially all the supply in agricultural products and controlling all sales. A combination of such agencies, dealing in commodities which are necessaries of life, has enormous power to do harm to the public by withholding supply and increasing prices. To prevent such combination, and particularly to prevent a monopoly in any one product, the New Zealand Commercial Trusts Act of 1910 was passed.

The Commercial Trusts Act of 1910.—Portions of the Act are obviously copies of the Australian Industries Preservation Act of 1906–9. S. 5 of the Commercial Trusts Act is substantially s. 7 (1) of the Industries Preservation Act as that Act read in 1909, except that the Commercial Trusts Act never required proof of intent to cause detriment to the public as an element of an offence. The New Zealand section is aimed only at those who conspire to monopolize wholly or partially the demand or supply of goods, and thus would not affect the individual who innocently acquires all the trade in any one industry.

Ss. 6, 7 and 8 of the Act are designed to prevent commercial trusts of vendors influenced by any commercial trust from charging excessive prices for products. These sections allow the trust or vendor to charge a price which will bring a "fair and reasonable profit." To enact provisions based on a test unrelated to the profit made by the vendor would be dangerous, because it might, in cases in which circumstances affected costs, cause absolute ruin to some, or prevent the salvation of an industry by just combination. These three sections are the only ones in the Act which relate to the nature of an offence and are not modelled on the Australian Industries Preservation Act of 1909.

Under the Commercial Trusts Act, no machinery other than ordinary court procedure and examination is established for the collection of evidence. Prosecution in a court is the only method in use to bring to task combinations which operate in restraint of trade to the public detriment. Thus the force of the Act depends entirely on the content of those sections relating to the nature of an offence, which have been the subject of judicial interpretation.

Administration and Judicial Interpretation.—The New Zealand Act was first utilized in 1912, in the case of *King* v. *The Merchants Association of New Zealand*.[1] The Merchants Association consisted of a combination formed for mutual benefit between the Colonial Sugar Refining Co., Levin & Co., Bannatyne & Co. and Nathan & Co. It was the custom of the Colonial Sugar Refining Co. to offer discounts at the end of each year according to the quantity of sugar purchased by the receiver of that rebate. The sugar company changed its scale of discount rates to make the maximum obtainable only by purchasers of great quantities of sugar, and then allowed all the purchases made by members of the association to be aggregated as though made by a single purchaser. In this way the members of the association were able to get a 5 per cent. rebate on sugar purchases, which the leading contenders, Fairbairn, Wright & Co., and Messrs. Dillicar Brothers, could not hope to get on the basis of quantity purchases.

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[1] 32 N.Z.L.R. 1233.

Suit was brought in the Supreme Court by the Attorney-General in the name of the King, in accordance with the provisions of the Commercial Trusts Act, to recover the penalties alleged to have been incurred for offences by the Merchants Association as an entity, and by its members individually, against ss. 3, 4, 5 and 9 of the Act. In the Supreme Court all members were convicted on all charges.

The defendants appealed from these convictions to the Court of Appeals of New Zealand. The Court of Appeals found that the new scale of discounts was put into effect for the purpose of enabling Levin & Co. and the other members of the trust to get a 5 per cent. rebate, and to prevent Fairbairn, Wright & Co. from getting the same discount. The reason for this action was that Levin & Co. was a membei of a commercial trust, and Fairbairn, Wright & Co. had refused to comply with the requests of that trust. Therefore conviction of the Colonial Sugar Co. under ss. 3 (*d*) and 4 (*c*) was upheld. The Merchants Association and Levin & Co., said the court, obviously aided and abetted the Sugar Co. within s. 9, and Bannatyne & Co. and Nathan & Co., being members of the trust, were guilty of the offence committed by the trust itself, under s. 7 of the Act.

In considering conspiracy to monopolize contrary to the public interest under s. 5, the court made reference to the Adelaide case,[1] in which the High Court of Australia held: "If the Vend agreement was unlawful, it is sufficient to dispose of the case, for the appellants, who knew of its nature, undoubtedly combined with the other defendants to give effect to it." That case, said the Court of Appeals in New Zealand, is authority, if authority be necessary, to show that an agreement or combination, although in effect it might operate to the public advantage, yet, if in itself it was contrary to law, would be held to be detrimental to the public interest. Thus a monopoly, unlawful because contrary to other sections, is against public interest under s. 5. The court, however, decided that the action of the Merchants Association was against public policy for other reasons. Its purpose was to raise prices by monopolizing, and that is *per se* detrimental to the public unless justified because for the preservation of a crippled industry. There was no such justification here. Therefore conviction under s. 5 of the Act was sustained.

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[1] 32 N.Z.L.R. 1233 at 1259. Williams J. stated: "The Commercial Trusts Act is an entirely new departure in our legislation. Legislation of a similar kind exists in Australia, but the provisions of our Act seem to be more stringent in several respects than those of the Australian Act. By ss. 3 and 4 of our Act certain acts are made offences. The Legislature has considered these acts to be evil in themselves, and the Court has not to consider whether any particular act which comes within the words of either of these sections is or is not contrary to the public interest."

Quotation from the Adelaide case is from 15 C.L.R. 65 at 90.

Following this decision, Fairbairn, Wright & Co. sued Levin & Co., claiming that since s. 4 of the Act was passed to protect traders from boycott, conviction of Levin & Co. under that section should support a claim for damage caused by the offence. The court admitted that if s. 4 was passed for the benefit of private traders, it would support a damage suit, under the English case of *Groves* v. *Wimborne*,[1] but the court found that s. 4 was passed to protect traders, not in their interests as individuals, but in that of the public at large, in furtherance of the general object of the Act, to repress monopolies. However, under the Mogul case,[2] if a trader in furtherance of his own interests used against a competitor weapons that are unlawful, and thereby caused him damage, the latter has a good cause of action. The means used here to cause injury to the plaintiff were acts declared unlawful under s. 4 of the Commercial Trusts Act. Therefore, said the court, applying the Mogul case, the plaintiff is entitled to recover in damages.[3]

The only other case determined under the Commercial Trusts Act occurred in 1925, namely *King* v. *Crown Milling Co. Ltd.*[4] Distributors Ltd., and most of the flour mills of New Zealand, including the Crown Milling Co., by agreement between them making Distributors Ltd. the *del credere* agent of the flour mills, formed a commercial trust. The Court of Appeals found that the trust tended from its main features: (1) to eliminate competition between flour millers, (2) to restrict the saleable output from each mill, (3) to establish a fixed price for all flour irrespective of quality, (4) to ensure that this fixed price should be determined from time to time by the commercial trust itself, and (5) that the public should be compelled to accept whatever brand of flour the trust should select, purchasers being carefully excluded from dealing directly with any individual flour miller.

The trust and its members were charged with having committed offences against s. 5 of the Act. The defendants in this case contended that the things proven by the Crown did not prove this particular monopoly to be against the public interest. The court held that under the wording of s. 5 the Crown had only to show that the monopoly was of such general *nature* as to be against the public interest, and that that being established, the onus was on the defendant to prove that his particular monopoly was not against the public interest, because justified as necessary to preserve a crippled industry. That was not shown here, and all the defendants were therefore convicted under s. 5.

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[1] [1898] 2 Q.B. 402.

[2] [1892] A.C. 25.

[3] *Fairbairn, Wright & Co.* v. *Levin & Co.*, (1914) 34 N.Z.L.R. 1.

[4] (1925) N.Z.L.R. 753.

Thus in New Zealand the only offence as far as monopolizing is concerned is the old common law offence of conspiring to monopolize to the detriment of the public, and the common law defence of justification is open to the alleged offender. The Act is stronger than the common law because of its penal sanction, and because, while at common law the action would be criminal, therefore being one which the Crown would hesitate to prosecute except in case of palpable wrongdoing, under the Act the action is civil, the penalty being considered a debt due to the Crown.

Ss. 3, 4 and 9 are clear and have reference to specific acts. Nothing need be proven to establish an offence against these sections except the doing of a forbidden act. No mention is made of intent or of detriment to the public. Nothing is contained in the sections which allows for any ambiguity of interpretation. The law is simply that any person who performs one of the forbidden acts is guilty of an offence, regardless of the doer's purpose, or of the effect of the act on the public.

No case has arisen involving ss. 6, 7 and 8. No mention is made in the New Zealand Act of restraints on trade. It is intended, rather, that ss. 6, 7 and 8 will, by forbidding commercial trusts to make more than a fair and reasonable profit, remove all cause for such restraints. The purpose of persons who contract to restrain trade is to preserve their industry, to further their own interests, or to raise prices to the public, The Parliament of New Zealand tacitly admits the right to raise prices to a reasonable level for the preservation of industry, and the right of people to combine to further their own interests, so long as prices are not raised to a level which yields more than a fair and reasonable profit.

When cases do arise under ss. 6, 7 and 8, the chief problem of the courts will be to establish what amounts to a fair and reasonable profit in each case. In order to establish an offence against these sections, it will be necessary to prove the cost of the commodity to the vendor, and the price received by him, and to compare the difference to what is found to be a " fair " and " reasonable " profit. Such profit must, of course, differ with the risk involved in each case.[1]

IV. SOUTH AFRICA.

The Profiteering Act of 1920.—The Union of South Africa, though rich in mineral deposits and dotted with mines, has enacted only one statute touching the field of restraints on trade. This Act was known as the Profiteering Act, being No. 27 of 1920, and was a temporary post-war measure, operative from August of 1920 till June of 1921.

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[1] That this profit differs in different industries is undeniable, since all fair and reasonable profits must depend to some extent on the risk to the vendor in conducting his particular type of business. It is not our purpose to discuss such matters, but merely to indicate them as factors relating to the facility of administration of the Act.

The Act provided for the establishment of a board consisting of a chairman and not less than four other members, in which was vested the power to investigate prices, costs and profits at all stages, and to order the appearance before it of any person, for the purpose of acquiring information, and to make certain types of orders concerning such profits, costs and prices. S. 9 of the Act was devoted to the investigation of trusts and combines. It provided that any person associated with the management of a trust, company, firm or combination, or a party to such an agreement or arrangement as is described in subs. (1) shall be guilty of an offence if it is proved that, owing to the operations of such a trust, company, firm or combination, or owing to the carrying out of such an arrangement or agreement, the price of any notified article produced within or imported into the Union has been unreasonably enhanced or the output of or market for any such notified article has been unduly restricted, etc.

Even a cursory examination of this section makes it obvious that it would indeed be difficult to convict any person of an offence against it. The words " unreasonable " and " undue " take us back to the old common law difficulty of interpretation and proof which contributed so much to the failure of the criminal provisions in Canada.

S. 3 of the Act, however, is stringent and gave considerable power to the board. Thus, the board had power (*a*) to investigate prices, costs and profits at all stages ; (*b*) to restrict profit at any or all stages ; (*c*) to compel any manufacturer, importer or distributor to supply any article which he may have in stock on the most favourable terms in accordance with the custom of the trade, to any *bona fide* trader, association of traders or co-operative society in a position to make satisfactory arrangements ; (*d*) to prohibit, regulate or restrict, subject to the approval of the Minister, the export of any article or class of articles required for the maintenance of the food supplies of the Union ; (*e*) to order that any article or class of articles shall pass from the producer, manufacturer or importer to the consumer in as direct a line and with as few intermediaries as possible ; and (*f*) to receive and investigate complaints that, since the commencement of this Act, there is being or has been made or is sought to be made an unreasonable profit.

This section gives the board practically unlimited powers in the repression of trade evils. It was not enacted to apply specifically to combinations, but its use in such application is evidenced by the fact that the only case occurring under this statute was prosecuted under this section rather than under s. 9, though it concerned a combination. The case referred to is that of *Transvaal Coal Owners Association* v. *The Board of Control.*[1] The Transvaal Coal Owners Association was formed in 1910, being composed of the principal collieries in the Transvaal and the Orange Free State. The association did not handle the coal, but effected sales, fixed prices and directed collieries to deliver to purchasers secured by the association. The collieries received a basis price for coal, and administration costs were deducted for the association, the remainder being pooled and divided equally among the colliery owners. This was obviously a combination, yet charges were laid under s. 3 of the Act. The board on its findings made orders that (*a*) coal produced by each company should be supplied on the most favourable terms in accordance with the custom of the trade to any *bona fide* trader; and (*b*) that the profit at the pit's mouth on coal produced by each company should be restricted to a uniform rate for each class of coal supplied to (*a*) industries or (*b*) merchants, and no further charges made for the coal excepting cost of transport to its destination.

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[1] (1921) Transvaal P.D. 447.

The dispute by the colliery owners was not as to the power of the board to make these orders, but as to procedural points, such as the validity of an order made by a quorum rather than by the whole board.

V. CONCLUSION

Among the British Dominions, there can be no absolute comparison of the efficiency of legislative anti-trust machinery as such, for no two Dominions are equally circumstanced. The purpose of legislation in any one country is to meet the immediate needs of that country, and to provide for those future needs which can be foreseen. Prerequisite to a comparative discussion of anti-trust legislative systems is an examination of the economies of the countries in which those systems exist.

The nature of an offence against any enactment is or is not sufficient to meet the need for legislation according to whether or not such nature includes those acts likely to be performed within the field of legislative jurisdiction. Behaviour which ought to be forbidden in any one legislative jurisdiction is that which conditions within that jurisdiction render probable of performance, and which will result in detriment to what in the jurisdiction constituted the public interest. Administrative machinery, like the nature of an offence, must be suited to the economy of the country. A legislature cannot be criticized for failure to set up elaborate machinery for investigation, if simple machinery is sufficient to meet the needs of the country.

Thus in each of the British Dominions we must determine the interests to be protected, and the actions likely to be performed in contravention of those interests. Only then can we determine the comparative merits of the systems adopted in the different Dominions to protect those interests from the performance of those actions.

The Nature of Trusts in the Dominions.—Canada, though sparsely settled, is a country of considerable industrial development. She is rich in natural resources, as lumber, coal and metals. Her Western Provinces produce quantities of agricultural commodities for home and export consumption. Since the advent of the twentieth century, there has been a tremendous influx of American capital into Canada, resulting in the establishment of large organizations of producers and middlemen. These organizations are not restricted to any one predominant class, as producers or wholesalers or retailers of manufactured goods, or jobbers or brokers of agricultural products. There are in Canada large organizations in each of these fields, and these organizations, because they are able to secure lower prices in the purchase of raw materials or manufactured or agricultural products, and because of their more efficient methods of distribution of these products, have made it difficult for competitors to survive except by similar organization. In many instances there have been mergers of these large corporations themselves, and monopoly has been acquired. The extent of the growth of these combinations is indicated by the findings of Commissioners conducting investigation under the Combines Investigation Act of 1923. In Canada, combines may exist in any field of trade, and protection is necessary in all fields.

In Australia, though her size is three-quarters that of Canada, and her population seven millions as compared to ten in Canada, there is comparatively little centralization of wealth. Her chief products are coal, gold, pig iron, cotton, sugar and grain. Predominant among these are coal and pig iron, involving chiefly producers and middlemen. In Australia, as in Canada, combinations of producers or middlemen or both are not improbable. But since her wealth is well distributed, few large combinations are likely to arise in the immediate future. Most existing or presently probable combinations are intra-State. That this condition may not continue is indicated by recent growth of Australian manufacturing industries. The total quantity of Australian products has more than doubled since 1915.

An island country, Australia depends for distribution of articles of inter-State commerce chiefly on water transportation. The Parliament of Australia, having jurisdiction only over inter-State commerce, and foreign commerce, must look to the protection of the public from possible combination of shipowners. These shipowners, since they do not necessarily purchase and sell the article in the course of its transfer from producer to consumer, cannot be called middlemen. They are carriers who by combination can achieve monopoly and power to charge excessive prices. They can, by arrangement for mutually exclusive dealing in a particular trade with producers or middlemen, oppress competitors and possibly gain a monopoly in a trade in which ordinarily there may be healthy competition. The possibility of shipping-producer combinations and the power incident to these combinations is illustrated by the coal-shipping combine which was prosecuted in 1912.[1] Their importance cannot be over-emphasized, since all of those States in Australia of any importance are situated on the seaboard, and ships have ready access to almost the whole population of the country.

In Australia anti-trust laws should be enacted to protect the public from combinations of producers, middlemen and the quasi-middlemen shipowners.

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[1] See pp. 56 *et seq.*

New Zealand, a small country having a total population of 1,500,000, depends almost entirely on farm produce. The personnel of New Zealand industry consists of farmers, who necessarily operate as individuals, and middlemen, such as jobbers and brokers, who purchase from the farmer to sell to the consumer. These middlemen, by combination, are able to control supply, and thus to control prices to the consumer. New Zealand has chiefly to guard against middlemen.

In all countries it is recognized that men may combine to further their own interests provided such furtherance does not result in detriment to the public. This right may even include the raising of prices to the public, if such action be necessary to the preservation of a crippled industry.

Keeping in mind the economic conditions of the separate Dominions, we are in a position to determine the relative merits of the legislative machinery created to suppress trusts and monopolies in each of these countries. Anti-trust legislative machinery is separable into two important divisions, the first devoted to extra-judicial, the second to judicial procedure. In the former the means provided for investigation of combines and for administrative suppression of them are of primary importance, and the nature of an offence against the Act secondary. In the latter the nature of an offence is everything.

Canada, in her system of suppression by investigation and publication of reports, employs an almost entirely administrative system. Australia, providing for investigation as a means of acquiring evidence, and prosecution as a means of enforcement, relies equally on extra-judicial and on judicial suppression. New Zealand, providing only for court proceedings, is not concerned with extra-judicial machinery of any sort.

The Relative Merits of the Three Systems in Relation to the Needs of the Separate Dominions. 1. Administrative Provisions concerning the Collection of Evidence. A. *Canada.*—An administrative board is an essential in Canada for the collection of evidence and to bring combines to the notice of the administrators of the Act. The failure of the Criminal Code sections was due in part to the ability of combines to exist without fear of having their wrongful practices brought to light. This ability was due to inability to establish proof by court examination of facts essential to successful prosecution. The lack of complaints under the Combines Investigation Act of 1910 was due to expense involved to complainants in establishing facts. The later Canadian anti-trust laws were designed in part to provide a means of investigation which would be efficient to discover all the facts, and which would involve no expense to the complainant, thus encouraging complaint.

The Canadian Combines Investigation Act of 1923 has been efficient in its purpose of bringing to light detrimental combines. Prior to 1919, the date at which it became possible for complainants to object to the practices of a combine without fear of expense in establishing their claim, there were less than twenty-five complaints under Federal anti-trust statutes. Since that date there have been several hundreds. It cannot be denied that under the Canadian system there is little probability of a combine existing without being at least brought to the notice of the administrators, and that without an administrative board of investigation such would not be the case.

The Board of Investigation as it is constituted is capable of efficiency or of inefficiency. Complaints are made to the Registrar of the Act. The Registrar's duty is to determine whether or not the complaint establishes a probability that a combine exists. If he is so satisfied, he must report to the Minister of Labour, who must appoint a Commissioner to investigate. The Registrar is a Government official and may be presumed to be efficient, as may the Minister of Labour. The Commissioner appointed is simply a citizen of the Minister's choice, and may or may not be efficient. The reports of Commissioners which have been published indicate that on the whole Commissioners may be deemed efficient, since in only one of eleven instances has the decision of the Commissioner been questioned as to the facts.

The investigators have been given wide powers with regard to examination of witnesses and production of documents, and have been able by use of these powers to determine the facts accurately. Their possible lack of efficiency lies in the possible appointment of an inefficient Registrar, an inefficient Minister or an inefficient Commissioner. Should any one of the board be unable properly to perform his duties, the whole board must fail in its purpose, for each of the three members has separate duties. Further, should a combine have political influence, which is not unlikely, since most combines represent considerable wealth, investigation may be quashed or coloured.

B. *Australia.*—Australia has not the same need as Canada for investigation by an administrative body. Trusts in Australia are uncommon because of distribution of wealth, and it is far less likely that combines may exist unknown to the Attorney-General, who must prosecute them under the Industries Preservation Act. It is necessary, however, to provide some means of investigation which will not involve expense to complainants, and to provide some means of inquiry which will bring out all the facts concerning an alleged combine. For these purposes the Comptroller-General has been constituted an investigation board to conduct preliminary inquiry. He has power to collect facts and report them to the Attorney-General. The Australian system of investigation, while it has been efficient to date,[1] is substantially the same as that of Canada, in that it creates a board with powers of investigation similar to those of the Registrar and Commissioner under the Canadian Combines Investigation Act, and it is subject to the same possible inefficiency.

[1] Evidence concerning the Vend-shipping combination is the only subject of its application up to the present time.

C. *New Zealand.*—In New Zealand no provision is made for an administrative investigation. In a country as small and free from trusts and with as small a population as New Zealand, such investigation is not necessary, since no combination of any size could escape the notice of the prosecutor.

2. Provisions relating to the Nature of an Offence and their Enforcement. A. *Canada.*—The success of the Combines Investigation Act of 1923 depends in great measure on the publication of reports of the Commissioner, disclosing the practices of the combine. The Proprietary Articles Trade Association was in this way forced to cease operation in Canada, though that Association consisted of almost 90 per cent. of the retail druggists of Canada. Publication in itself, if it reveals to the public practices which are oppressive to the public, is an effective way of declaring a boycott against the combine for as long as it shall continue to operate.[1] But the purpose of publication was not so much to cure existing evils as to prevent future ones. It was the theory of the Legislature that those who formerly would not have hesitated to form a combine would be prevented from doing so by fear of almost certain investigation and publicity, and possible prosecution.[2] How effective the Act has been in the realization of this end is and must remain a matter of conjecture, since we cannot determine what combines might have been formed had it not been for the existence of the Act. We do know that only eleven reports were published in the first eleven years of administration. That may be indicative of success of the Act, in that those who do choose to combine are careful not to be guilty of any practices forbidden by the Act. On the other hand, it may be evidence that the combines have used commercial power to prevent publication. It is a known fact that powerful business concerns have some influence over governmental bodies. It is not unlikely that at least some of the reports have been withheld because of such pressure, or that some of the findings of Commissioners have for that reason been coloured. Business influence in politics, while it is to be abhorred, exists, and no one could be more admirably situated to acquire and make use of it than financially powerful combines which have already been guilty of unlawful trade practices.

The great weakness in the Combines Investigation Act of 1923 is its ability to work injustice. A single Commissioner, appointed to investigate, is empowered to submit a report; and unless he reports that it should not be published as a matter of public policy, it shall be published. If his findings indicate that a combine exists, and is unlawfully operating, the members of that combine are publicly accused of being guilty of actions for which they could be criminally prosecuted. It is true that the very small percentage of reports published indicate that it has been the policy of the Commissioners to advise against publication. But a total of four cases in which reports have been published have led to prosecution, and one of those four resulted in a finding by the Court that the Commissioner was mistaken as to the facts, and that the members of the accused body were doing nothing unlawful.[1]

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[1] There can be no boycott by others in the same trade in the case of monopoly. There may, however, be refusal by the public to deal with the combine unless that combine controls absolutely the supply in a necessity. It is for such cases that prosecution is intended, if there be refusal to obey the orders of the administrative body.

[2] "The value of a measure of this kind is not to be estimated by the number of prosecutions that take place, nor by the number of investigations. Rather it is to be estimated by the power of prevention which lies in the fact that it is known that a certain course of procedure will inevitably lead to an investigation and disclosure of conduct that is contrary to the public interest."—Mr. McKenzie King, proposer of the Bill, House of Commons Debates, 1923, vol. 3, p. 2605.

The provisions of the Combines Investigation Act of 1923 are, in their relation to the nature of an offence against the Act, necessarily general. Canada, economically situated as she is, and having need for protection from all forms of combinations in restraint of trade, must define an unlawful combine in terms which really include every known form of bad trade practice. But an interpretation of the nature of an offence against the Act is not important except to determine the findings of Commissioners. They must interpret the Act, and are not bound by the decisions of other Commissioners. An offence against the Act really has become something which in the personal opinion of the Commissioner is against the public interest.

B. *Australia.*—Prosecution is the sole means of enforcement of the Industries Preservation Act of 1906–10. Thus, while in Canada the nature of an offence has not been of any great import, in Australia it is all-important. In construing the provisions of the Act, we must keep in mind the original purpose for which it was passed, namely to prevent the admission of foreign trusts into Australia, and to prevent the internal growth of trusts which might control Australian wealth and destroy competition in trade, and thus amass power with which to fight governmental attempts to eliminate them.

There have been five amendments to the Act, four of which have related to all or some of ss. 4, 7, 9 and 10, the sections defining offences against the Act. There has been no re-drafting of these sections, and there have been no prosecutions which might point out to the legislators the weaknesses of their legislation since the final amendment in 1910. The result is a bad piece of drafting. Under the Act as it now stands, we have seen that an individual who secures a monopoly, using no wrongful means and for no wrongful purpose, even, perhaps, simply by failure of competitors from causes with which he had no concern, may be prosecuted for an indictable offence. Further, a contract which is in restraint of trade or commerce, whether or not it be unreasonable or detrimental to the public, may be restrained. I cannot think that it was the intent of the Legislature that such effect should be given to the Act. And indeed it never has been so used. There must certainly have been contracts or combinations working some restraint of inter-State trade in Australia since 1910, yet none of these has been prosecuted. Even the Vend-shipping combination would surely fall within the terms of s. 10 if that section be literally interpreted.

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[1] *King* v. *Famous Players Canadian Corporation*, (1903) O.R. 307.

Two explanations are possible for the lack of prosecutions under the Industries Preservation Act. One is that it is interpreted to prohibit only harmful restraints. The other is that, taking advantage of s. 14, which provides that no proceeding shall be instituted without the written consent of the Attorney-General, the administrators have simply failed to enforce it. The former, at least as to injunction, is negatived by the erasion by the Legislature in the enactment of 1910 (App. 3) of the words "to the detriment of the public." It seems to have been the definite intention of the Legislature that restraints on trade should be enjoinable whether or not they are to the detriment of the public.

As to the second reason for failure of prosecution, the Attorney-General may have two motives for failure to take action. First, it would be perfectly consistent with the purpose of the Act to refuse to allow prosecution unless in his opinion there existed violation of the specific terms of the Act in such a way as to violate at the same time the purpose for which it was enacted. It seems to have been the desire of the Legislature in passing the Act, and more particularly in the successive amendments, to leave the trader as much freedom as possible, but to have an Act which would include anything and everything which might be undesirable from the point of view of the protection of industry. In each of the amendments the Act was so altered as to be made more stringent. But it was not until the Legislature was forced by the Adelaide decision [1] that it was made to cover all restraints of trade, or monopolies or attempts to monopolize. It was with reluctance that the Legislature finally put into effect provisions as stringent as those of the 1910 amendment, and it seems inconsistent with the behaviour of the Legislature to say that it intended to penalize or restrain acts which might be not only performed in good conscience, but actually beneficial to the public, as are restraints which preserve a crippled industry.

That the Act as now drafted includes as offences actions which the Legislature never intended to include is, I think, beyond question, if we consider its application to an individual who innocently acquires a monopolistic position. But it is equally beyond question that the Legislature intended to include as offences against the Act all restraints of trade and all monopolies resulting from combination, and all attempts to monopolize. I can only conclude that if the Legislature is to be considered at all consistent, it cannot have intended that the Act should be enforced strictly. It must, therefore, have been the intent of the Legislature that the Act should be enforced only when the Attorney-General, whose task it is to determine what combinations or contracts or monopolies shall be prosecuted, determines that such contract, combination or monopoly ought to be prosecuted or restrained.

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[1] [1913] A.C. 781.

A second possible reason for failure on the part of the Attorney-General to prosecute is the fear that the courts will refuse to enforce the Act as it stands, and will therefore be thrown back upon the Adelaide decision. The Court of final determination in Australian cases is the Judicial Committee of the Privy Council, which rendered the decision in the Adelaide case.[1] If a case comes before the Privy Council, to be determined under the Act as it now stands, the court will probably find that the Act was not meant to be interpreted literally. It will then be their task to determine how the Act *is* meant to be interpreted. Their Lordships' natural course is to fall back on their decision in the Adelaide case, which declared what the law was in 1912.

The Act as interpreted is anything but efficient. There is no certainty of prosecution of offenders, and no feeling of safety for those who quite innocently enter into a contract which, though reasonable and not detrimental to the public, may be found to fall within the terms of the Act. The Act as it stands has lost all its force as a preventive measure, and may or may not be enforced when it properly should, according to the whim of the Attorney-General and the attitude of the courts. In short, the Legislature, in an effort to protect completely the public as a whole, has by its efforts by amendment made the Act so strict in its provisions that it cannot be literally enforced, and therefore defeats its own purpose by leaving the public, including offenders, in doubt as to whether or not it will be enforced at all.

My conclusion is that when the time comes for the Act to be put into active use, that is, when Australian industry becomes so developed that there is constant need for any Act, as there has proven to be in Canada, the Act in its present form will be discarded, and some new legislation worked out to express in terms less confusing and unenforceable the avowed purpose of the present Act.

C. *New Zealand.*—Except in the case of boycott or monopoly, the New Zealand Act contains no provision directly outlawing restraints on trade. Protection against these is provided in those sections of the Act which forbid sale at prices which will yield more than a fair and reasonable profit. What is a fair and reasonable profit would in most industries be almost impossible to prove. In New Zealand the commodities to which the Act applies are agricultural produce. The Act is aimed at the middleman, who purchases from the farmer for sale to the consumer. In his case costs and sales prices are not too difficult of proof, and the sections are workable.

Boycotts present little difficulty, and are well defined and provided against in the New Zealand Statute, as they are in the Australian Act by ss. *7a* and *7b*.

The New Zealand Statute, while it would not be successful in Canada or Australia because of the need in those countries for investigation machinery, and because of the numerous classes of combiners from whom they must protect the public, is efficient to meet the needs of New Zealand, and has therefore been successful in its operation.

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[1] *Supra*, note 2, p. 57.

The Canadian Act has been successful, to external appearances, to the present day. But should it suffer two or three successive defeats by having the findings of the Commissioners disapproved by the courts, it would undoubtedly become a dead-head, as did the Combines Investigation Act of 1910, which contained substantially the same provisions but created a fear among possible complainants that they would bear considerable expense in establishing a *prima facie* case before a judge.

The Australian system is capable of much surer success than the Canadian system, if the nature of an offence be clearly defined in terms which are enforceable. Of these two systems, supposing for the moment that the economic needs of the two countries correspond, the Canadian is the more efficient as they are at present drafted, but it has inherent weaknesses such as possibility of political influence or injustice by publication of the report of a mistaken Commissioner. The Australian system, if properly drafted so that strict enforcement may be required, is certain to work justice, is free from political influence and has as efficient a system of investigation as the Canadian system, at as little cost to the complainant.

APPENDIX 3.

Ss. 4, 7 AND 10 OF THE AUSTRALIAN INDUSTRIES PRESERVATION ACT AS AMENDED BY No. 29 OF 1910.

4. (1) Any person who, either as principal or as agent, makes or enters into any contract, or is or continues to be a member of or engages in any combination, in relation to trade or commerce with other countries or among the States—

(*a*) in restraint of or with intent to restrain trade or commerce, or

(*b*) to the destruction or injury of or with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers,

is guilty of an offence.

Penalty—Five hundred pounds, or, in the case of a continuing offence, five hundred pounds for each day during which the offence continues.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

(3) It shall be a defence to a proceeding for an offence under paragraph (*a*) of subsection (1) of this section, and an answer to an allegation that a contract was made or entered into in restraint of, or with intent to restrain,

trade or commerce, if the party alleged to have contravened this section proves—

(*a*) that the matter or thing alleged to have been done in restraint of, or with intent to restrain, trade or commerce, was not to the detriment of the public, and

(*b*) that the restraint of trade or commerce effected or intended was not unreasonable.

7. (1) Any person who monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize, any part of the trade or commerce with other countries or among the States, is guilty of an indictable offence.

Penalty—Five hundred pounds for each day during which the offence continues, or one year's imprisonment, or both; or, in the case of a corporation, one thousand pounds for each day during which the offence continues.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.

(3) The Attorney-General may elect, instead of proceeding by indictment for an offence against this section, to institute proceedings in the High Court by way of civil action for the recovery of the pecuniary penalties for the offence; in which case the action shall be tried before a Justice of that Court without a Jury.

10. (1) The Attorney-General, or any person thereto authorized by him, may institute proceedings in the High Court to restrain by injunction after hearing and determining the merits and not by way of interlocutory order the carrying out of any contract made or entered into after the commencement of this Act or any combination which—

(*a*) is in restraint of trade or commerce; or

(*b*) is destructive or injurious, by means of unfair competition, to any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers.

Provided that this section shall only apply to contracts or combinations in relation to commerce with other countries or among the States.

(2) On the conviction of any person for an offence under this Part of this Act the Justice before whom the trial takes place shall, upon application by or on behalf of the Attorney-General or any person thereto authorized by him, grant an injunction restraining the convicted person and his servants and agents from the repetition or continuance of the offence of which he has been convicted.

RESPONSIBILITY FOR PIRACY IN THE MIDDLE AGES.

[*Contributed by* EDWARD LEWIS, ESQ., M.A.]

THE essence of piracy is robbery upon the high seas,[1] although various other constitutive elements have been added by the exigencies of history. The inherent nature of an act of piracy, committed upon the high seas, beyond the exclusive jurisdiction of any one state, makes necessary an international law, a law which will define the boundaries of the concurrent jurisdiction of each state over the apprehension of a pirate.

If, in theory, each person is a national of some one state, then if a state captures a pirate, subject of another state, there is a conflict of jurisdiction. Early publicists resolved this conflict by declaring that a pirate could claim the allegiance of no state; he was the enemy of mankind,[2] subject to suppression by any state. According to modern opinion, with the commission of an act of piracy a person loses the protection of the state of which he is a national; he becomes liable to apprehension by any state.[3] Both the early and the modern opinions lead to the same conclusion with regard to the responsibility for piracy, namely, that no state is responsible for the piratical actions of its subjects.

In the Middle Ages, however, when piracy and warfare were continuous and frequently indistinguishable, a prince was strictly responsible for the acts of piracy of his subjects. The purpose of this study is to define and explain the operation of this principle of responsibility. Due largely to the availability of documentary material, England in the late Middle Ages, from the end of the thirteenth to the end of the fifteenth centuries, is used as the example, although there is evidence to indicate that similar developments took place in each of the maritime European states.

In interpreting historical materials gathered from the Middle Ages, the fallacy of the application of purely modern conceptions must be avoided. Medieval law was not always an exact science, and its terminology was frequently diffuse.[1] A shadowy line divided private from public law, and internal from international law. It is only in relation to the medieval state of society that the principle of responsibility for piracy can be understood.

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[1] See 26 *Am. Jour. Int. Law*, special sup., p. 743, October 1932.

[2] In Wynn, W., *Life of Sir L. Jenkins*, p. xci (London, 1724): "This Power and Jurisdiction which his Majesty hath at Sea in those remoter Parts of the World, is but in concurrence with all other Soveraign Princes that have Ships and Subjects at sea; and is on this Special Regard that *Pirates* are called *Hostes Humani Generis*; . . . So all Nations and Soveraign Princes that meet with them, have a just and competent Authority to execute the Law upon them."

[3] Gebert, *Die Völkerrechtliche Denationalisierung der Piraterie*, in Niemeyer's *Zeitschrift für Int. Recht.*, v. 26, Band I, pp. 8–70.

The plan of this study consists, first, of an explanation of the rule of responsibility by reference to individual cases of piracy; second, of the development of this rule in its expression in international treaties, conventions and agreements; and third, of a critical examination of the principle in the light of test cases.

Explanation of the Rule of Responsibility.—In the Middle Ages private warfare and robbery were often similar. If there were no differentiation between them, however, the sovereign's responsibility for piracy would be contingent upon his liability for the acts of his privateers. It becomes necessary to show, therefore, that there was an appreciation of the difference between legal and illegal capture; between privateering and piracy. The following two examples are typical of many others found among official documents.

In 1335 King Edward III of England wrote to John, Duke of Normandy, complaining that some of his subjects, merchants, had been attacked and robbed by certain men of Normandy. The stolen merchandise was arrested by the bailiffs of "Rowen and Caux" at the suit of the merchants. The captors asserted that as a state of war existed between England and Scotland, the Normans, who were friends of the Scots, could seize English goods. The king argued that at the time of the seizure an armistice, "proclaimed in fitting places," was in operation between England and Scotland, that there was no war, and that therefore the seizure was unlawful and piratical. He demanded that the goods, or their value, be returned to his merchants.[2]

The distinction between privateering and piracy is strongly emphasized in a proclamation of 1426, of friendly intercourse between England and Flanders, in which it is stated that all goods seized must be held under arrest until their capture has been legally certified by competent authority. If a ship is brought into port without its master and crew, the captors shall be put under arrest immediately, as it is probable that the missing men have been thrown overboard, which would indicate that they were the king's friends, for had they been his enemies, they would have been held for ransom.[3]

Thus, although private maritime warfare frequently resembled robbery, yet there was a clear conception of the difference between privateering and piracy. With this preliminary observation in mind, it is possible to enlarge upon the principle of responsibility with reference to individual cases of piracy.

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[1] Plucknett, T. F. T., *Statutes and their Interpretation in the First Half of the Fourteenth Century*, Introduction and Part I (Cambridge University Press, 1922).

[2] *Calendar of the Close Rolls*, Edward III, 1333–7, p. 507; also in Rymer's *Fœdera*, v. II, pt. ii, p. 912 (ed. of London, 1821), henceforth noted: *Fœdera* II, ii, 912 (etc.). See also *C. Close Rolls*, Edward III, 1343–6, p. 218; *ibid.*, pp. 127–8; *Fœdera*, III, ii, 1005; *C. Patent Rolls*, Henry IV, 1405–8, pp. 301, 350.

[3] *C. Close Rolls*, Henry VI. v. 1, 1422–9, p. 263; also in Rymer's *Fœdera*, Original ed., v. X, pp. 367–8, henceforth noted: *Fœdera*, O. X., 367–8 (etc.). See also *Year Book*, Richard III, Anno II, case no. 4.

A foreign merchant despoiled by English pirates usually applied to the King of England for the privilege of suing in an English court to recover his stolen property, and in similar circumstances, an aggrieved English merchant petitioned a foreign prince. It was only after foreign justice had failed that more direct pressure was applied.

So numerous were the suits for restitution of goods stolen by pirates that a standard petition was evolved for dealing with them adequately. In 1308 an obscure English clerk appealed to his king for payment for the duties which he had performed in preparing suits for merchants despoiled by French pirates. Appended to the reply to his request is this formula. Among its items are the following: the names of the vessels robbed, and of their masters; the quantity and quality of the merchandise which they carried; the manner in which the merchandise was marked and sealed; the date of the ships' departure from port; the location of the scene of the crime, and the date of its occurrence; the duration of the imprisonment of the mariners, if they had been imprisoned; the form of the conversion of the merchandise, if it had been sold; the names of the pirates; and lastly, the names of the justices who had been appointed to hear the case in the course of ordinary judicial inquiry.[1]

Typical of the many petitions for redress following the above formula was one presented to the king and his council in 1322 by "Albrith de Breme, marchant de Alemaine." The stolen goods are listed, and their value. The merchant describes how he and nine of his companions had been assaulted by two English vessels from Winchelsea and Greenwich, how a battle had ensued, during the course of which a mariner had been killed, how the boats were wrecked, and the merchandise stolen and later sold. The merchant asks that the council grant him a "convenable remedie en resoun."[2]

When, however, local courts refused to do justice, the merchant petitioned his own king for letters to the prince whose subjects had done the spoil. For instance, in 1309, Edward III wrote to Ferdinand, King of Castile, saying that he had sent letters to the "escaldi, consules, and communities" of the town of Vivero, where a ship, owned by one of the English king's subjects of Bayonne, had been pillaged. If the local official should fail to do justice, Edward requests that Ferdinand intercede.[3]

In the case of a piracy done by Flemings near the harbour of Portsmouth, Flemish courts had refused to give restitution, and King Edward wrote directly to Robert, Count of Flanders, requesting the proper treatment of his merchants.[1]

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[1] *Rotuli Parliamentorum*, v. 1, p. 277*b*, no. 25.

[2] *Ibid.*, v. 1, p. 397*a*, no. 56. See also *Fœdera*, II, i, 233; *C. Patent Rolls*, Edward I, 1301–7, p. 286; *C. Patent Rolls*, Edward III, 1338–40, p. 280.

[3] *C. Close Rolls*, Edward II, 1307–13, p. 223.

In rare circumstances, local remedies were not exhausted before an appeal was taken to higher authority. In 1327, for example, an English merchant petitioned Parliament for the redress of a piracy done by four French ships, whose men had feloniously assaulted his ship and killed its crew. There is no indication that justice had first been sought in French courts. The king directed the petition to Chancery, where right would be done "according to the Law used in case of Arrest." [2] As England and France at this time were openly hostile to each other, it would have been difficult to have obtained a favourable decision from a French court. Usually, however, every means of obtaining redress was exhausted before arrests were invoked, as, for example, in 1327, in the case of a Flemish piracy against English ships, in which the merchant applied for redress to Edward III. The king directed a letter to William, Count of Hainault, asking him to hear the complaint of his aggrieved subject; [3] Edward refused to grant a more forceful remedy until the count should fail to do justice.

Occasionally, however, conflicts of jurisdiction arose, conflicts which serve to clarify the local remedy rule and to emphasize the principle of responsibility. Such a one was the interesting case of Berengar Letonis, which occurred in 1323.

Berengar and others, subjects of the Kings of Majorca and of Aragon, were robbed, upon the sea, of two galleys and much valuable merchandise, by men owing allegiance to the King of England. Berengar refused to present a petition for redress in the usual form, but appealed directly to his king, who wrote on his behalf to Edward II, demanding redress.[4] Edward declined to grant the request for restitution because those who were robbed refused to press for justice, and under those circumstances, by the laws of England, it would be difficult to prove the crime.[5] After a full consideration of the case with his council, however, Edward instituted a special process whereby the criminal acts could be proved and prosecuted, although according to the common law of England the process should have been begun by the interested party. When the truth had been found, Edward promised to restore the goods and to punish the malefactors.[6] Berengar, however, did not await the result of the special process, and returned home to demand the issue of letters of marque to the amount of the merchandise stolen. James, King of Aragon, thereupon wrote to the King of England that he considered that the robbery had been sufficiently proved, and that therefore restitution should be granted. He stated that in his country, after the fact of the illicit act has been established, " he causes the lord of the robbers to be required to make satisfaction for the stolen goods, and if the lord do not so, he then grants his subjects licence to impound, and he acquires other aids whereby his subjects who have been robbed may be satisfied." [1] Edward objected that licences to impound were only issued when the lords refused to do justice after repeated request, and that in this case Berengar had not waited until justice had taken its course.

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[1] *Fœdera*, II, i, 75. See also *C. Close Rolls*, Edward III, 1343–6, p. 231.

[2] *Rot. Parl.*, v. II, p. 435, no. 57.

[3] *C. Close Rolls*, Edward III, 1327–30, p. 218.

[4] *C. Close Rolls*, Edward II, 1318–23, p. 714; *Fœdera*, II, i, 523.

[5] "secundum legem & consuetudinem regni nostri" (*Fœdera*, II, i, 523).

[6] *C. Close Rolls*, Edward II, 1323–7, p. 135; *Fœdera*, II, i, 534.

While the dispute was in progress, relations between Aragon, Majorca and England continued cordial. This is indicated by the fact that in September 1324, Edward asked the King of Aragon to aid him with troops against France,[2] and in October of the same year he commissioned certain persons to negotiate a marriage between his eldest son and the daughter of the King of Aragon.[3] The controversy, therefore, was one of legal principles. It served to crystallize the local remedy rule. At the same time, the above case demonstrated that such suits were more than civil procedures involving no direct responsibility for the sovereign of the spoilers ; if the judgment were faulty, or if the sentence were not executed in good faith, the lord of the despoiled was entitled to issue letters of marque, which, in effect, certified the responsibility of the lord of the spoilers.

Another controversial case was presented before King Edward III in 1343. It was alleged that English privateers had committed an act of piracy upon the ships of subjects of a friendly monarch, Peter, King of Aragon. Peter took information and wrote to Edward demanding satisfaction. In the suit which ensued in the English courts, the privateers successfully convinced the king of their innocence, and accordingly, restitution was refused.[4] King Peter, in his reply, stated that in his country it was customary " for the lord of the person despoiled to take information concerning the damages inflicted and demand restitution of the lord of the spoilers, and that the execution and not the knowledge of the matter alone pertains to the lord of the spoilers." [5] The King of England argued that before restitution could be granted, a suit should be entertained in his country. As a last resort, the letters of the King of Aragon, together with other information upon the matter, were sent to the Seneschal of Gascony, the administrative head of the county of domicile of the privateers, with orders from Edward to cause the complement of justice to be done. King Peter considered Edward responsible for the piracy, even though the English courts refused to acknowledge the responsibility.

The prevalence of piracy brought an ever-increasing number of cases before the tribunals of each maritime country. It was necessary that the complex procedure and the endless multiplication of suits should be prevented, and that the restoration of stolen property should be a simple and rapid process.

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[1] *C. Close Rolls*, Edward II, 1323–7, pp. 312–13.

[2] *Fœdera*, II, i, 572. [3] *Ibid.*, p. 573.

[4] *C. Close Rolls*, Edward III, 1343–6, p. 127.

[5] *Ibid.*, p. 398 : " et quod ad dominum dampnificantis sola pertinet executio et non cognitio præmissorum " (*Fœdera*, III, i, 14).

By the statute of the twenty-seventh year of the reign of Edward III,[1] it was said that if any merchant, privy or foreign, should be robbed of his goods upon the sea, and if the goods should come into an English port, he need only identify them by his marks and seals, and forthwith they would be delivered to him, " without making other Suit at the Common Law."

Procedural simplification in the courts accelerated settlement of contested cases. Where once, for example, it had been necessary to name the pirates, now it was no longer essential.[2] After a piracy had been clearly established in the court of the lord of the despoiled, with the request for restitution of the spoilers, the question became a municipal one, except that the international responsibility of the prince for the execution of the other remained.

In summary, it has been shown that in the Middle Ages there was a definite conception of the difference between privateering and piracy. Where illegal seizure and piracy had occurred, the prince whose subjects had done the spoil was responsible for redressing the injury. At first the procedure for obtaining restitution was complex, and involved rigid adherence to prescribed formulæ ; later, with the great increase in the number of piratical acts, it became no longer necessary for the despoiled merchant to fight protracted law suits in both his own and the foreign country. The means of enforcement of the responsibility of the sovereign was the issue of letters of marque and reprisal against his commerce, but this extreme measure was, in practice, rarely taken until the local justice offered by the prince was exhausted. The few controversies which did arise served to emphasize this local remedy rule.

Development of the Rule in its Expression in International Treaties, etc.—While many piracy claims were liquidated by the direct action of the claimants themselves, such settlements were possible largely because of a network of treaties. Joint international action first took the form of agreements arranging for a settlement of claims already existing and for which a prince was responsible. Succeeding truces and treaties made more efficient arrangements for adjudicating such suits, and by the end of the Middle Ages, comprehensive commercial treaties provided, in advance, for decisions in connexion with piracy claims, and rigidly defined the responsibility of the prince.

Early in the fourteenth century various agreements were signed between England and Flanders with respect to the frequent piracies occurring on the high seas. In 1309, between the envoy of Robert,

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[1] St. 2, cap. 13, in 1 *Stat. Realm* 338.

[2] See *C. Patent Rolls*, 1350–4, p. 165 ; *Fœdera*, O. VIII, 99 ; *C. Patent Rolls*, Henry VI, 1446–52, p. 89 ; *ibid.*, p. 476.

Count of Flanders, and the king's council, was concluded an agreement for the settlement of the claims arising from robberies and arrests made by each side. And on August 5, in pursuance of that understanding, it was proclaimed in Boston fair and in other trading centres of England that all merchants who wished to complain of damages inflicted upon them by men of Flanders should go to that state to bring their complaints before the justices of the said count appointed by reason of the treaty.[1] Again, in 1311, the sheriffs of England were ordered to proclaim that all men wishing to complain of robberies committed by the subjects of Robert of Flanders should be at London in the octaves of Holy Trinity, to make their suit before a committee of envoys of the said count and of the king's council.[2] And in 1315, as a result of persistent piracies and hostile acts between Flanders and England, the representatives of the count and of the king drew up a treaty by which commissioners on each side were appointed with full power to decide the disputes which had arisen, according to "*la Lei & la Custume de la terre & la Lei Marchaunde.*"

Other treaties to the same effect were concluded with various maritime European states, as, for example, that in 1309 between the King of England and the King of Norway,[3] and also in 1309, that between the King of England and the King of Castile.[4]

Each of these agreements was similar. The envoy of the foreign state and the king's council or its representatives met and agreed to settle the claims arising between each. It cannot be said that the damages were caused by privateering, for war did not exist between the various contracting powers. The attacks were illegal seizures upon the high seas, although they were directed against members of one state rather than haphazardly against any state.

In 1320 there is recorded a treaty betweeen Robert, Count of Flanders, and Edward II. Amongst other claims settled under this instrument was one made by certain merchants of Flanders, who while voyaging on the English sea with their wines and other merchandise, were attacked near "Craudon" by English pirates, "and they prayed the king to cause punishment to be made for this deed, because he is lord of the sea and the robbery was made on the sea within his power."[5] From the brief notation of the treaty it is not possible to determine accurately the location of the spoil, except that the town of Craudon, or Crauden, was in Brittany. The piracy was probably committed somewhere in the English Channel. If, as this case seems to indicate, the king exerted exclusive jurisdiction over the whole Channel, then the theoretical basis for the claims arising from piratical attacks would be quite different from the thesis here suggested; the basis of the king's responsibility would be that, because he dominated the Narrow Seas, it was his duty to police them. Were another state attacked by pirates, the laxity of the control of the king would be the indirect cause of the attack, and therefore he would be responsible for it. After the Norman Conquest, England possessed both sides of the Channel, which fact gave colour to the pretension of English hegemony, as suggested by Selden and his successors. In summarizing the evidence adduced by seventeenth-century writers, claimed to support a continuous control over the Narrow Seas from the eleventh century, Mr. Thomas W. Fulton writes:

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[1] *C. Close Rolls*, Edward II, 1307–13, p. 223.

[2] *Ibid.*, p. 349; *Fœdera*, II, i, 133.

[3] *C. Close Rolls*, 1307–13, p. 224; *Fœdera*, II, i, 81.

[4] *C. Close Rolls*, 1307–13, p. 230; *Fœdera*, II, i, 92.

[5] *C. Close Rolls*, Edward II, 1318–23, p. 347; *Fœdera*, II, i, 434. "Et prierent que le Roi, de sa seignurie et poer real, fait sente dreit & punissement del dit fait, de sicomme il est seigneur de la mer, et la dite roberie fut fait sur la mer dans son poer."

> The evidence . . . merely proves that measures were taken for guarding the seas, defending the coasts and suppressing piracy,—duties which were discharged, even in the same seas, by the Admiralty of other countries, as that of France. Such phrases as "to guard the seas," "to guard the seas and sea-coasts," are common enough in the early records of the Admiralty, but they do not imply exclusive dominion. It was a duty common to neighbouring nations.[1]

A similar conclusion was reached by Mr. R. G. Marsden, in commenting upon the *Fasciculus de Superioritate Maris*, a fourteenth-century document.[2] Further, the theory of English dominion does not explain why responsibility should be reciprocal, and why England might protest against the attacks of foreign pirates and expect to receive reparations. Consequently it may be said that responsibility for piracy was not based upon the English control of the seas.

As has been indicated above, international action upon piracy problems first took the form of treaties and agreements which arranged for the settlement of isolated disputes which had already arisen. A later development, however, forsaw that robberies might take place, and provision was made, in advance, for the disposal of piracy claims. It was recognized that in periods of truce, piratical attacks might occur, attacks which would endanger friendly relations between powers.

It is difficult to take note of the many outbreaks of hostilities and succeeding periods of truce in the troubled era of the Hundred Years War; each truce, however, generally contained a provision for a settlement of claims arising out of piratical attacks. For example, in the truce with Castile in 1344, it was arranged that procurators from England and Castile should meet one month after the truce had entered into effect in order to settle claims,[3] and in 1348, in an extensive treaty with Castile, commissioners were appointed with full power to settle the piracy suits which had arisen during previous truces.[4]

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[1] *The Sovereignty of the Sea*, p. 31 (Blackwood, London, 1911).

[2] Marsden, *Select Pleas in the Court of Admiralty*, v. 1, Introduction, p. xxxv (Selden Society Publications, no. 6, London, 1894).

[3] *Fœdera*, III, i, 12.

[4] *Fœdera*, III, i, 152. See also *C. Close Rolls*, Edward III, 1349–54, p. 267; *Fœdera*, III, i, 205; *C. Close Rolls*, Edward III, 1349–54, p. 369.

The creation of *ad hoc* commissions to decide cases of restitution became increasingly inconvenient as the numbers of suits multiplied. This difficulty was minimized in a truce with France, in 1376, by the appointment of "conservators," who could devote a large proportion of their time to the work of settling piracy and other claims which endangered the life of the truce. They were to meet for fifteen days, at bi-monthly intervals during the truce. In presenting a case before them, two reputable merchants or two "bourgeois" were sufficient witnesses to establish the fact of a robbery. Once it had been proved, the conservators were to search for the stolen goods, and upon their discovery, to restore them. They were empowered to constrain the malefactors by imprisonment. The restoration must take place within seven months after the first information had been taken.[1] In 1384, again, conservators were appointed, with similar powers.[2] From this time forth many of these officials helped to keep the peace between sovereigns. Not always, however, were they faithful and reliable in the execution of their duty. In one example an order was issued for the investigation of the activities of the conservators appointed for Scotland, with instructions to punish, correct and reform them if they were found guilty of negligence in any detail.[3] Bribery was a pungent form of corruption, as these officials were able to secure great wealth by covert encouragement of piratical enterprises.

In England the duties of the conservator were rigidly outlined by statute in 1414.[4] It was stated that the frequent robberies and slayings committed by the king's lieges and subjects during the truces brought great dishonour upon his name, and that from thenceforth such actions would be adjudged high treason "done against the King's Crown and his Dignity." For the more effective administration of the Act, in each port there was appointed a conservator, with a yearly salary, in lands, equal to £40. He was commissioned by letters patent and by the admiral to inquire into all such criminal acts done as well on the high seas as in port. Two men "learned in the Law" were appointed to assist him. Suitable punishment for malefactors could be prescribed, except that in cases of homicide the final decision rested with the admiral. The men, officers, and owners of each vessel, when leaving port, must swear to the conservator that all truces and safe-conducts would be honoured, and all vessels captured from the king's enemies must be certified before the conservator.

This piece of legislation was in advance of its time, and it was cancelled by later statutes,[5] but as a number of examples will show, it was made internationally effective by a series of treaties. The statute indicated, moreover, a tendency in the first part of the fifteenth century in the direction of a suppression of piracy by preventive rather than by curative measures. Instead of making provision only for the settlement of disputes which should arise or which had already arisen, letters of marque were no longer issued indiscriminately, for example, and the treaties which regulated the sphere of commercial relationships distinguished more clearly between privateering and piracy.

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[1] *Fœdera*, III, ii, 1068.
[2] *Fœdera*, O. VII, 421. See also *ibid.*, p. 724.
[3] *Fœdera*, O. XI, 284.
[4] 2 *Stat. Realm*, 178; 2 Henry V, st. 1, cap. 6.
[5] 14 Henry VI, cap. 8; 20 Henry VI, cap. 11.

In 1412, in a treaty with Flanders, it was stipulated that if any privateers or pirates should bring their stolen goods to land, the merchandise would not be bought or sold, but would be immediately arrested and preserved for its rightful owners. While conservators were not appointed, restitution was to be made by the local officials of the country where the property was in custody. To make sure that justice would be done, a new provision was introduced, by which, if, with the knowledge of local officers, the stolen goods were sold, the suitors could recover the true value of their merchandise from the purse of the official who had been lax.[1]

Similarly, in a truce with Burgundy in 1417, it was agreed that all goods seized by pirates and "*Gens labourans sur la Guerre*" could not be legally sold, but if the stolen property had been bought, the local officials must return either the goods or their value. It was forbidden to issue letters of marque to merchants to avenge seizures; instead, a conference could be held and the lords of each party would decree suitable restitution.[2]

By a treaty with Brittany, in 1440, it was strictly forbidden for any subject of one to inflict damage upon the other, and on the part of England each vessel leaving port must give adequate surety that it would honour the treaty. If any English subject should violate it without the consent of the king, prompt restitution would be awarded by a commission of notable men appointed for each port. If the stolen merchandise were not available, the inhabitants of the port where the goods were first brought would be forced to pay damages to the amount stolen. In the case of seizures of doubtful legality, the cargo would be held intact for two months to enable the owners to sue to recover it.[3]

In the important series of commercial treaties which were signed between various European princes in the middle of the fifteenth century, merchants were protected from piratical attacks.[4] Nevertheless, sovereigns were liable for the acts of their piratical subjects, as, for example, in the treaty signed in 1478 between England and Burgundy, in which there is an express stipulation that no pirates of any nation will be received in the ports of either contractant. If damages should be done by them, however, special local commissioners would be appointed with full power to order restitution.[5]

But this responsibility of the sovereign, which is everywhere so evident, was not an abstract thing, terminated by pious statements that future piracies would be suppressed. If due restitution was not obtained from the pirates themselves, or from local authorities who had custody of the stolen merchandise, the sovereign himself was bound to provide payment to the extent of the damage done.[1] Not in every case was it the king's innate generosity which prompted him to pay obligations for spoils committed by his subjects. Sometimes such payments cemented friendships which were advantageous and lucrative. It cannot be denied that when money changes hands, a definite obligation is acknowledged, and here the obligation is the responsibility of a prince for the acts of piracy committed by his subjects.

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[1] *Fœdera*, O. VIII, 768.

[2] *Fœdera*, O. IX, 483. See also *C. Close Rolls*, Henry VI, v. 1, 1422–9, p. 264; *Fœdera*, O. IX, 360, 263, 264; *Fœdera*, O. X, 367–8.

[3] *Fœdera*, O. X, 803–5.

[4] *Ibid.*, O. XI, 140–6; 591–9.

[5] *Ibid.*, O. XII, 67–76.

In summary: in the early part of the fourteenth century agreements and treaties were negotiated only after disputes had arisen, in order that peaceful relations might be restored. Many of the conflicts were caused by private ships of war which had exceeded their commissions by attacking merchant vessels of friendly states. From these attacks came suits for damages, prosecuted in the country of the spoiler. When spoliations of friendly commerce assumed widespread proportions, it was generally necessary that a treaty be negotiated, arranging for the settlement of the large number of claims arising. Later in the century, sections were inserted into treaties making such piratical attacks illegal, and creating more efficient machinery for the settlement of those cases which were presented. Commissioners were appointed by each state, and at the meetings which were held, disputes were solved.

During the brief interruptions of the Hundred Years War, energetic privateers and pirates continued to attack commerce, even though truces were in operation. Out of these attacks grew so many suits for restoration of merchandise illegally seized that truces provided for the appointment, in prominent ports of each contracting state, of conservators, to whom was entrusted the duty of the adjudication of claims. In the extensive commercial treaties of the middle of the fifteenth century a rigid demarcation of the legitimate sphere of privateering, in effect, defined the essential elements of an illegal seizure, and at the same time reaffirmed the responsibility of the prince for these piratical attacks.

Critical Examination of the Principle in the Light of Test Cases.—While the great majority of cases are in conformity with the principle of responsibility, there are a few which seem, at first sight, to be at variance with it.

In 1323, for example, King Edward II wrote to Charles, King of France, requesting that restitution be made to Jakeminus de Recto, merchant of Genoa, for his ship and cargo, stolen near Sandwich by the admiral of certain ships of Louis, the former King of France.[2] If justice were not done to the merchant, Edward threatened to invoke the usual remedy—arrest, or letters of marque and reprisal. Why should the King of England seek restitution for a merchant of Genoa? The location of the spoil provides the answer. The act of piracy was committed in the Downs, near Sandwich, which had long been considered a part of England. The maintenance of order in English territory was obviously the duty of the king. The despoiling of a Genoese merchant was an infraction of that order, for which the king was responsible. He, however, shifted the responsibility to the French, who had committed the act of spoliation. This explanation is reinforced by an earlier communication upon the same subject, in which the king indicated that the spoil was done upon the merchant while he was " within this realm whilst under the king's protection." [1]

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[1] *C. Patent Rolls*, Edward III, 1327–30, p. 520; *C. Close Rolls*, Edward III, 1341–3, p. 371; *C. Patent Rolls*, 1354–8, p. 92; *Fœdera*, III, ii, 922, 931; *C. Patent Rolls*, Edward IV, Henry VI, 1467–77, pp. 474, 599.

[2] *C. Close Rolls*, Edward II, 1318–23, p. 692.

Another Genoese ship was plundered, in the same location, by Hugh le Depenser, sailing with the fleet of Edward II. In this case, upon request for redress by the envoys of Genoa, the king replied that after deliberation with skilled persons, it was decided that none of the spoil was his responsibility, and that he was not bound by " mere law " to make restitution—a decision which was contrary to the one suggested in the previous example. While the king denied liability, his actions belied his words, because for the satisfaction of this claim he assigned 8,000 marks sterling to the merchants of Genoa, provided that no letters of marque were laid against English shipping because of this spoil.[2] By a pragmatic test, then, he acknowledged his debt.

A complicated case came before the Court of Chancery in 1445. Some merchants of Venice had been spoiled upon the high seas by " one Massyn Spaynard, and other pirates," and the booty was taken to Cartagena. The goods were reladen on a carrack belonging to Lionel Italyan, a merchant of Genoa, who took his ship to Southampton and exposed the goods for sale. The Venetians petitioned the king for recovery, which recovery was granted.[3] To follow the rule of responsibility, it would seem that the merchants of Venice should have sued in the courts of Spain, or if not there, in the courts of Genoa. The suit in the English court, however, indicated no personal responsibility on the part of the King of England. If the spoil were not redressed, it would not be his duty to provide payment, although he might, if he so desired, force restoration by arrests upon the persons and property of merchants of Genoa. Here it was again the location of the goods which determined the location of the suit for restoration.

From the beginning of the fifteenth century there were attempts made to outlaw pirates and to make them " enemies of all mankind," to use a seventeenth-century expression. Such attempts, however, did not deny the responsibility of the sovereign when these pirates, his subjects, committed acts of piracy.

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[1] *Ibid.*, p. 496; *Fœdera*, II, i, 455: " apud les Dunes, juxta portum de Sandwyco, infra regnum nostro."

[2] *C. Close Rolls*, Edward III, 1333–7, pp. 686–7.

[3] *C. Patent Rolls*, Henry VI, 1441–6, p. 463.

For example, in 1403, between England and France it was agreed not to receive sea-robbers, or persons banished from either realm. Any who should enter would be arrested immediately, and would suffer the retention of their goods and merchandise.[1] In another case, in 1404, Henry IV excused himself in a letter to the Grand Master of the Teutonic Order, by saying that the many spoliations committed by bands of pirates roving up and down the seas were not done by his will and consent. He did not, however, make the logical deduction that he need not give restitution for these unauthorized damages done by his subjects, members of these bands; instead, he assured the Grand Master that he was ready "to exhibit full justice with favour" unto any of his people who should make complaint.[2]

In the commercial treaty between England and Burgundy, in 1478, there is a clause which provides that no pirates of any nation will be received in the ports of either contractant. The same clause, however, requires restitution for any damages done by pirates, subjects of either one or the other.[3] A similar treaty between England and Denmark in 1490 forbids the subjects of either to assist pirates in any way by providing them with money, munitions, instruments of war or victuals. The treaty contains, however, the usual sections relating to the restoration of spoiled merchandise.[4] The outlawry of pirates appears to be one means of aiding to suppress them. Nowhere, however, was responsibility denied for acts of piracy done by subjects of a prince.

In conclusion, it is necessary to state that responsibility for piracy is but one phase of the sovereign's responsibility for the acts of his subjects; it is, nevertheless, a phase which demonstrates that principle with crystal clarity. Looking beyond the legal machinery, what is the basis of the principle? What will explain its variance with many modern conceptions of sovereign rights? It is in the basis of feudal society that the answer is found. The feudal hierarchy was built upon the sacred bond of allegiance between lord and liege. Medieval minds thought in terms of this allegiance. As in the domestic field the lord was responsible for the actions of his vassals, so also in the international sphere the prince was responsible for the activities of his lieges, whether they were pirates or law-abiding subjects.

[1] *C. Patent Rolls*, Henry IV, 1401–5, 201.

[2] Hakluyt, *Principal Navigations*, v. 2, p. 42; Hak. Soc. publications, extra series.

[3] *Fœdera*, O. XII, 67–76.

[4] *Ibid.*, 385.

LIBERAL THOUGHT AND UNDEFINED CRIMES.

[*Contributed by* DR. JUR. PAUL WEIDENBAUM.]

IT is the merit of Dr. Stallybrass[1] to have drawn the attention of the English lawyer to a problem which is of basic importance in the theory, although of minor significance in the practice, of Criminal Common Law. " When applied to a new subject "—to use Willis J.'s famous definition[2] —the " principles of private justice, moral fitness and public convenience . . . make Common Law without a precedence." Does this creative power of the Common Law extend to the province of Criminal Law? Modern writers on jurisprudence do not put the question at all and seem, therefore, to answer it impliedly in the affirmative.[3] In Dr. Stallybrass's opinion, however, such power is unnecessary and even dangerous in modern Criminal Law. This province of the law consists to-day of a body of coherent and very detailed rules; the judges are only in exceptional circumstances faced with entirely new problems. Their solution is, however, better left to Parliament. The very danger of judge-made Criminal Law is in Dr. Stallybrass's view its nature as *ex post facto* legislation. " It opens up a gloomy vista of indefinite criminal liability." He is, therefore, unable to approve of a recent decision of the Criminal Court: *Rex* v. *Manley*.[4] By wilfully false statements a woman caused certain policemen to devote their time to unnecessary investigations. Her act did not constitute one of the defined and specified types of crime, but it was held an undefined misdemeanour of committing an act tending to the public mischief. *Rex* v. *Manley* is, as Dr. Stallybrass has shown, based on scanty direct authority. In English jurisprudence the problem in its criminal aspect does not seem to have been discussed since the arbitrary bills of attainder became obsolete. Only Sir Fitzjames Stephen and Sir William Erle C.J. mentioned it *in passim*.[5] On the Continent, however, and in the United States legal[6] and historical[1] research have been devoted to the questions of *ex post facto* legislation and of undefined crimes. In the discussion of the problem it might, therefore, not be deemed wholly inappropriate to consider the history and the present state of the law in these countries. Dr. Stallybrass himself begins his paper with a citation of Italian law.

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[1] *Law Quarterly Review* (1933), lxix, p. 183.

[2] *Millar* v. *Taylor*, (1769) 4 Bur. 2303.

[3] Cf., for instance, Salmond-Manning, *Jurisprud.*, 8th ed., cc. 4 and 17.

[4] [1933] 1 K.B. 529.

[5] Stephen, *History*, vol. 3, c. 34, p. 354; Erle, *Trade Unions*.

[6] Roux, *Droit Pénal*, 2nd ed., 1927, par. 6, p. 16; Garraud, 3rd ed., vol. i, nos. 138–9; Dégois, 2nd ed., nos. 70–1; Vidal et Magnot, 6th ed., no. 897; Liszt-Schmidt, *Strafrecht*, 26th ed., 1933, par. 18, i, p. 106; Bierling, *Jurist, Prinzipienlehre*, 1911, vol. 4, Gerland, art. 116 (*Grundrechte und Grundpflichten d. Reichsverfassung*); Evans, *Leading Cases on American Const. Law*, 1925, pp. 353–90.

Application of the Maxim "Nulla pœna sine lege."—"*Nulla pœna sine lege*" is the maxim by which Continental jurisprudence expresses the postulate that neither legislator nor judge ought to punish acts which have not been criminal at the time of their committal. The maxim was not known to Roman law. "The Roman Penal Legislation was not complete. Only Sulla, Cæsar and Octavian issued penal laws of significance. Before and after their time, from the twelve tables up to Justinian we do not find any important penal enactment. It was often a matter of judicial discretion not only how severely, but even whether at all a wrongful act ought to be punished."[2] Even Italian medieval lawyers did not know the maxim.[3] Their lead was followed by the German medieval scholars. Karpzow concluded from Roman sources that every *pœna extraordinaria* necessarily is a *pœna arbitraria*; every punishment rests with the discretion of the judge.[4] The first legal rules somewhat similar to the maxim *nulla pœna sine lege* are to be found in the thirteenth and fourteenth centuries. These rules were naturally directed against abuses of a widely unrestricted power of arbitrary punishment. It might be of interest to the English lawyer that according to some Continental writers of authority[5] the Magna Carta contains the first legal principle of this kind: . . . *nullus liber homo capiatur vel imprisonatur* . . . *nisi* . . . *per legem terræ* . . .

This principle, although primarily a rule of procedure, tended, in the opinion of these writers, to support the line of thought which is to-day expressed by the maxim *nulla pœna sine lege.* This tendency, be it based on correct technical interpretation or not, exercised an important influence on Continental jurisprudence. At a relatively early date the Criminal Law has been codified in certain federal states of the German Empire.[6] These codifications brought a partial victory to the maxim *nulla pœna sine lege*, partial only in so far as analogy was expressly allowed to the judges.[7] In France, however, the penal law was not codified at all and the law of her provinces, the *coutumes*, allowed arbitrary decisions.[1] The French Revolution and the victory of liberalism in other countries brought the final and unrestricted application of the rule. The " déclaration des droits de l'homme et des citoyens " establishes the principle: . . . *null ne peut être puni qu'en vertu d'une loi établie et promulgée antérieurement au délit et légalement appliquée*.[2]

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[1] Schottländer, *Die geschichtliche Entwicklung des Satzes nulla pœna sine lege*, Strafr. Abh. Heft 132. Elvers, *Die Bedeutung des Satzes nulla pœna sine lege.*

[2] Wenger, *Das Recht der Griechen und Römer* (1914), p. 281. Mommsen, *Röm. Strafrecht*, p. 280, 55.

[3] Wenger, *ubi supra*, p. 282.

[4] Cf. *Juristische Wochenschau*, 1934, p. 206.

[5] Liszt-Schmidt, *ubi supra*, Leipzig. Kom., par. 2, i. Schottländer, *ubi supra. Contra*; Gerland, *ubi supra*, p. 380; Elvers, *ubi supra.*

[6] Schottländer, *ubi supra*; Siegert, *Auslegung und Analogie im heutigen Strafrecht*, Jur. Wochenschrift, 1935, p. 889.

[7] *E.g.* Tiroler Halsgerichtsordnung of 1499; cf. Carolina, art. 105.

The American Constitution forbids *ex post facto* legislation.[3] In Germany one of the greatest lawyers she ever possessed, Feuerbach, succeeded in eliminating analogy from Criminal Law. It was he who first formulated the expression *nulla pœna sine lege*.[4] In 1914 probably all important Continental countries complied with Feuerbach's postulate. Only paragraph 151 of the Russian Criminal Code allowed analogy, but was rarely used in practice.[5] In spite of the intimate connexion of the maxim with liberal theory and practice we do not find that the non-liberal constitutions of the twentieth century abolish the maxim without discrimination. The Penal Code of Russia still allows analogy.[6] But this permission is probably not more significant than it was in former times.[7] Paragraph 1 of the Italian Penal Code expressly enacts the maxim which is even by the Fascist state deemed to be the primary safeguard of the citizens against arbitrary powers of the authorities. Only in Germany a lively discussion of the maxim took place. There is one example of *ex post facto* legislation : the *lex van der Luppe*. Analogy will be allowed if the following rule of the draft penal code becomes law :

" A wrongful act which is not within the definition of a certain crime but is (1) according to sound public opinion *contra bonos mores* and (2) infringes a principle of public policy on which a specific criminal law is based, so that this law can be applied by analogy, must be punished pursuant to the law applied by analogy."

And what is more important, the maxim *nulla pœna sine lege* is deemed to be in its very essence opposed to the principles of the totalitarian state.[8]

Even so short a review of the historical development must be perplexing. The maxim is based on liberal thought, but was contested for in feudal times. It seems to be opposed to the very principles of the totalitarian state, but it is emphasized by the new Italian code. We might leave alone any special difficulty offered by the application of the maxim to a system of Common Law : even then history and present application of the maxim do not show, at first sight, the nature of the maxim.

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[1] Roux, *Cours de droit criminel*, 1927, par. 6, p. 17.

[2] Art. 8 ; cf. Code Pénal, art. 4.

[3] Cf. note 4, p. 96.

[4] Liszt-Schmidt, *Strafrecht*, 26th ed., par. 18, ii, p. 107.

[5] Freund, *Strafgesetzbuch Sovjietrusslands*, 1925, p. 103. P. I. Lublinski Prawo Shiisn, 1924, vol. 1, pp. 40–50.

[6] Freund, *ubi supra* ; art. 10 of the Soviet Code.

[7] Freund, *ubi supra*. Cf., however, Krylenko in the 3rd sess. of the A.Z.E.K. (15.5.1922): " It is impossible in our times to codify all crimes, as many types alter continuously and do not fall into the legal definitions of the old order. . . ."

[8] Cf. Henkel, *Strafrichter und Gesetz im neuen Staate*, Teil 1 : *Kein Verbrechen ohne Strafe*. Siegert, *ubi supra*.

Political Aspect of the Maxim.—I venture to suggest that three different aspects of the maxim must be distinguished.

The first aspect is a purely political one. It is directed against arbitrary powers of the administration or of a judiciary which is dependent on the administration. The reasons which entitle the state authorities to imprison a person must be defined by a body of rules which is either fixed or, if flexible, administered by independent judges.[1] Only then does the judicial nature of the decisions seem to be guaranteed. In so far, indeed, is the Magna Carta an enactment tending to support the maxim.[2] [3] In so far the application of the rule has been contested for by certain classes of the realm in feudal times and by the " bourgeoisie " in the times of the liberalism. To-day this purely political aspect is without significance in the technical Criminal Law of the democratic as well as of the totalitarian states. In liberal states the constitutional independence of the judiciary is guaranteed. In the non-liberal states the protection of special totalitarian interests is not a part of technical Criminal Law and procedure.[4] It is entrusted to administrative law and procedure. In technical Criminal Law, therefore, the old liberal forms can be retained without difficulty as it has been done in Italy. These considerations are of course only based on the purely technical side of the issue. From a broader point of view the idea of a totalitarian state is, indeed, opposed to the liberal maxim *nulla pœna sine lege*, and the German writers on jurisprudence do not confine their arguments to the technical side alone.[5] This seems, in my submission, to explain the different views of the German and the Italian writers.

Economic Aspect of the Maxim.—The second aspect of the maxim is one of economic politics. Changes in economic conditions as well as in political thought often confer upon the judge the task of facing new legal problems. The Trade Union movements in the nineteenth century, restrictive agreements regulating certain markets in modern times,[6] might be cited as examples. Although such problems mainly concern issues of civil law, they sometimes affect notions of criminal law as well.[7] Dr. Stallybrass is of the opinion that legislation only should regulate such issues. It is certainly true that the final solution of great political or economic issues must be left to legislation or to public opinion as clearly expressed in elections or elsewhere. But before a problem reaches so advanced a stage that a solution can be offered, or, rather, before the problem is recognized as such at all, the judge might be faced with the task of deciding practical issues.[1] It might be open to the judge to decide these new issues according to old legal rules, pretending that he does not see the new problem at all. But in doing so he actually decides the practical question in one way or another. He follows all possible considerations with the only exceptions of those which actually ought to rule the case. But, in my submission, a greater chance exists to achieve the best possible decision if the judge endeavours to try the real issue according to principles of "private justice, moral fitness and public convenience." Mistakes cannot always be avoided,[2] but the modern examples of judge-made economic law in England stand, in my submission, comparison with systems where the judges had not the same opportunity or not the same inclination to arrive at independent decisions. These considerations apply generally to civil as well as to criminal law, except for one modification: in civil cases a decision one way or another must be arrived at, even if questions of economic or other public policy of extreme difficulty arise. In criminal cases it might often be more adequate to acquit the accused. It is from this point of view that the position of the law created by *Rex* v. *Denyer* and *Hardy & Lane* v. *Chiltern*[3] is specially to be regretted. According to these decisions it is possible that a person might be punished for an act which has been held to be lawful by a civil court. This state of the law is, however, generally recognized as an anomaly.

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[1] Persons of equal standing were deemed to be sufficiently reliable in 1215. The process evolving a genuinely independent judiciary was not concluded before five centuries had elapsed.

[2] As to the controversy among Continental writers see note 5, p. 91.

[3] The province of protective custody, for instance, is not a part of technical criminal law nor has it to be decided upon by members of the judiciary.

[4] Henkel, *ubi supra*; Siegert, *ubi supra*.

[5] See note 8, p. 92.

[6] Cf. *English Hopgrowers* v. *Dering*, [1928] 2 K.B. 174.

[7] Cf. *Rex* v. *Denyer*, [1926] 2 K.B. 258.

Technical Aspect of the Maxim.—The third aspect of the rule is a purely technical one. Every crime has, at Common Law as well as by statute, a certain fixed definition which in most cases leads to adequate results. Very rarely, however, cases come to be decided which lie outside the formal definition, although they are clearly covered by the genuine meaning of a criminal law. As examples may be mentioned the obtaining of a passport under the name of another,[1] the admission to an Inn of Court under false pretence,[2] or, to cite cases which have turned up in codified law, " the theft " of electrical power which could not be held to be a " substantial thing " in the meaning of the German Penal Code,[3] or, the recent case of " fraud " by inserting valueless coins in an automatic telephone—not held to be criminal fraud by the German Supreme Court in 1934 because no " person " was deceived.[4] In this class of cases the maxim *nulla pœna sine lege* has been applied by the German Supreme Court, whereas English law allows analogy. The great liberal maxim has, in my submission, nothing—apart from mere technicalities—to do with these petty cases. Here the wrongdoer knows that his act has, if detected, evil consequences. Unless he is a learned member of the profession he has no idea how far and why his acts are to be distinguished from any other theft, fraud or cheating. The application of the maxim is in these cases based on the fiction that everybody knows the law. This fiction is indispensable in many branches of the law, mainly to prevent a person pleading his own mistaken view on legal questions. This genuine purpose of the fiction has nothing to do with the cases under consideration, nor has the maxim *nulla pœna sine lege* according to its historical significance. And furthermore, the rule against technical analogies originates, I cannot help thinking, in a *captatio principii.* If every punishment must be based on law, why cannot this law be ascertained by analogy ? As long as genuine law is administered and arbitrary decisions are safeguarded against it cannot matter. It might sometimes be doubtful whether the judge, in a particular case, will apply analogy ; its scope cannot be fixed with *a priori* certainty. But every modern criminal law knows of necessity notions of this kind : " reasonableness " or the lack of " reasonable and probable cause " might be mentioned as examples furnished by English law. No doubt analogy must remain within narrow limits. But why the judges cannot be entrusted with this task—insignificant if compared with so many duties of highest importance laid upon them—I cannot see.

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[1] Cf. the early decision *North-Western Salt Co.* v. *Electrolytic Alkali Co.*, [1914] A.C. 461, and the final solution in *English Hopgrowers* v. *Dering*, *ubi supra*.

[2] Stephen (*History*, vol. 3, p. 354; quoted with approval by Stallybrass, *ubi supra*, p. 190) writes: ". . . the last occasion on which such a course was taken was the treatment of conspiracies in restraint of trade as a Common Law misdemeanour. I have given the history of the matter and it is by no means favourable to the declaration by the Bench of new offences. . . ." Even if the solution afforded by the nineteenth-century judges might not have been what we to-day consider "right," it ought not be assumed that the legislative solutions of the time, for instance, in U.S.A. or Germany, were, from the point of view of present times, better. To give a twentieth-century example: the law as to regulations of markets by pools and other restrictive agreements is covered, in England, by such decisions as *English Hopgrowers* v. *Dering*, *ubi supra*; the elastic and adaptable notion of reasonableness holds the field. In U.S.A. and on the Continent the last twenty years brought many legal enactments against, regulating or in favour of certain "cartells" or pools, none of which achieved the continuity and practicability of English law.

[3] [1928] 2 K.B. 306.

We come, therefore, to the conclusion that the maxim *nulla pœna sine lege* is generally acknowledged—with the exception perhaps of some German writers—as a fundamental principle of jurisprudence. There are, however, exceptions. Changes of economic conditions and of public policy cannot be without influence even on Criminal Law. Furthermore, the maxim ought not to be applied in its merely technical aspect ; analogy ought to be allowed within proper limits.

Existence of Maxim in English Law.—English Criminal Law is, in my submission, in accordance with these postulates.

The notion of an ever-developing and ever-elastic Common Law seems to be opposed to the maxim. But the creative power of Common Law has in no province been so small as in Criminal Law. Statutory law and the activity of the Star Chamber have been predominant in creating new crimes. Common Law as well had its share in establishing new types of crimes;[1] Holmes's case,[2] where setting fire to one's own house was held to be a misdemeanour at Common Law, might be cited apart from the authorities mentioned by Stallybrass. The scope of these authorities is astonishingly small if compared with the wide and general notion of Common Law. Even historically the creative function of criminal Common Law was exhibited only in the drawing of some analogies. As to the present law Sir Fitzjames Stephen remarks in his admirable chapter on codification[3] that English criminal law is more detailed and leaves less discretion to the judge than Continental law. We come, therefore, with Dr. Stallybrass, to the conclusion that the maxim *nulla pœna sine lege* exists in English law, although, in my submission, not so much as *a priori* postulate of justice but as a result of certain historical developments. The purely political aspect of the maxim became, furthermore, firmly anchored in the constitutional customs and laws of the realm.[4]

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[1] *R.* v. *Brailsford,* [1905] 2 K.B. 730.

[2] *R.* v. *Bassey,* (1931) 22 Cr. App. R. 160.

[3] R.G. Strafsachen, 29, 116 ; 32, 185.

[4] R.G. Strafsachen, 68, 65.

English law knows as well the exceptions to the rule. The judges have clearly asserted the power to decide questions of economic and public policy not only in the province of civil but even of criminal law. And secondly, analogy is allowed in English criminal law. So much at least is left of the original creative power of Common Law. And here, in Common Law, such power is even more adequate than in a system of codification. Continental codes, as has been mentioned above, give generally more freedom to the judges than the highly developed Common Law of to-day. These codes contain the fundamental notions only, leaving discretion in detailed questions to the judges. As for Italian law I cannot help thinking that Italian judges, if they really want to, have a power to punish as " specified " crimes acts which are not more clearly defined than that they tend to create public mischief.

> Art. 660. Whoever, in a public place or a place open to the public, or by means of the telephone, through . . . any culpable motive, causes molestation or disturbance to anyone shall be punished with imprisonment up to six months or with a fine up to Lire 5,000.

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[1] Holdsworth, *History*, vol. viii, p. 305.

[2] (1635) Cro. Cas. 376.

[3] *Ubi supra*, p. 353.

[4] This was not always so. Cf. judgment of the Supreme Court of U.S.A. (1798) 3 Dall 386. ". . . The prohibition (of the Constitution) against . . . making any *ex post facto* laws . . . arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such bills under the denomination of bills of attainder. Sometimes they respected the crime by declaring acts to be treason which were not treason. . . . To prevent such . . . violence and injustice . . . the federal state legislatures were prohibited from passing any . . . *ex post facto* law. . . ." To-day the constitutional custom mentioned above has the same guaranty as so many other laws and customs of the constitution : the tacit sanction of Parliament.

Art. 282. Whoever commits an offence against the honour or prestige of the Head of Government shall be punished with penal servitude from 1 to 5 years.

Legislative systematic and jurisprudence on the Continent have, furthermore, worked out a General Part of the law out of rules which are in England either dealt with in preliminary chapters or together with certain specified crimes, as, for instance, the rules relating to *mens rea*, negligence, error, accessories and conspiracies. In this General Part the maxim has, on certain technical grounds, no or very restricted application. If the exclusion of analogy leads to anomalous decisions on the Continent, the more reason for the Common Law judges to assert their power to draw analogies. *Rex* v. *Manley* and the earlier decisions *Rex* v. *Brailsford*[1] and *Rex* v. *Porter*[2] establish, therefore, in my submission, genuine authorities. These judgments comply with the general notion and the historical development of the Common Law. They are desirable from a practical point of view. The practice of other countries is at least not generally opposed to certain technical exceptions from the maxim *nulla pœna sine lege*. And these exceptions are, in my submission, clearly reconcilable with the true character of the maxim and the principles of a liberal constitution.

[1] [1905] 2 K.B. 730.

[2] [1910] 1 K.B. 369.

INTERNATIONAL ARBITRAL TRIBUNALS AND THE MEXICAN CLAIMS COMMISSIONS.

[*Contributed by* SIR JOHN H. PERCIVAL, K.B.E.]

THE Law and Practice of International Arbitral Tribunals has been a subject rather neglected by British lawyers and authors, and though a greater interest has been taken in this sphere of law in America, almost the only two authoritative books of reference are Borchard's *Diplomatic Protection of Citizens Abroad* and Ralston's *Law and Procedure of Arbitral Tribunals*. There is therefore an obvious opportunity for a further textbook on the matter, especially as no fewer than seven International Commissions were set up during the years 1923–34 to deal with claims against the Mexican Government on behalf of foreigners—two with the United States and one each with Great Britain, France, Germany, Italy and Spain. The recent work of Mr. A. H. Feller [1] is accordingly welcome; the circumstances provide him with a considerable mass of material, and an opportunity of comparing the views of men brought up in a number of different systems of law.

The decisions and opinions of the Commissioners, in the form of judgments, often with a dissenting minority opinion, have been published only in the case of the two American and British Commissions, but Mr. Feller has had access to the archives of the Mexican Foreign Office, and is therefore able to compare and cite the decisions of the other four Commissions also.

The first five chapters of the work are devoted to an interesting historical survey of the various revolutions in Mexico, the negotiations with the different Powers, which resulted in the Conventions finally arrived at with each, and the manner in which each of the Commissions got down to its work. So far as the U.S.A., whose citizens were interested to a far greater extent than those of any other country, were concerned, two Conventions were signed in 1923, setting up the Special Claims Commission which had jurisdiction over claims by citizens of the United States against the Mexican Government arising from acts of revolutionary forces between November 1910 and May 1920, and the General Claims Commission to deal with claims of citizens of each of the two countries against the other, except claims arising from acts incident to the revolutions. Mexican citizens had no grievances against any other Power, so that the remaining Conventions with France in 1924, Germany in 1925, Spain and Great Britain in 1926 and finally Italy in 1927 set up Commissions with jurisdiction practically identical with that of the United States-Mexico Special Claims Commission. In each case the Commission was to consist of one Commissioner appointed by each government party to the Convention, and a third, who was to preside, to be selected by mutual agreement, or in default by the President of the Permanent Court of Arbitration.

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[1] *The Mexican Claims Commissions*, 1923–34. *A Study in the Law and Procedure of International Tribunals.* By A. H. Feller, special assistant to the Attorney-General of the United States; sometime instructor in international law, Harvard Law School.

Great divergences were shown in the history of the work of the various Commissions. The United States-Mexico General Claims Commission was the first to start, but though it sat with some intervals during eight years and delivered some admirable opinions it only disposed of about 150 claims out of 3,500. The United States Special Claims Commission really came to grief over the Santa Isabel case, and after dismissing a few claims it finally came to an end without delivering any favourable awards. The Franco-Mexican Commission was almost equally unfortunate ; differences arose between the two Commissioners and the President and the Mexican Government, and only two awards were accepted as binding. In the case of these two countries fresh arrangements were made on a different basis to deal with the disputed claims. The German-Mexican, British-Mexican and Italian-Mexican Commissions on the other hand worked harmoniously and efficiently and each disposed of all their cases in about four years, delivering 72, 110 and 106 decisions respectively. The Spanish-Mexican Commission also completed its work, but Mr. Feller has not been able to obtain details of its decisions as in the case of the others.

English lawyers, however, will not be so interested in the history of the Commissions as in the nature of the judgments which they delivered, and more particularly in the manner in which men imbued with the rather different principles of British and Continental law managed to compose their differences. So far as substantive law is concerned the differences between the two systems are not very great, and the Mexican Government set out its intentions in generous terms almost identically in Art. 2 of the various Conventions as follows : " It is the desire of Mexico *ex gratia* fully to compensate the injured parties, and not that her responsibility should be established in conformity with the general principles of international law ; and it is sufficient therefore that it be established that the alleged damage actually took place and was due to any of the causes enumerated in Art. 3 of this Convention " . . . and that it was the duty of each member of the Commission to " judge with impartiality in accordance with the principles of justice and equity." This, however, did not prevent the Mexican agents from raising every possible objection, technical and otherwise, and as a matter of fact all the Commissions applied as far as possible the principles of international law, except in dealing with the primary question of the responsibility of the Mexican Government as defined in Art. 3 of the Conventions.

This article, which again was practically the same in all the Conventions, laid down that Mexico was liable for losses or damages caused during the period between Nov. 20, 1910 and May 31, 1920, inclusive, by one or any of the following forces:

1. By the forces of a government *de jure* or *de facto* ;

2. By revolutionary forces which after the triumph of their cause have established governments *de jure* or *de facto*, or by revolutionary forces opposed to them ;

3. By forces arising from the disjunction of those mentioned in the next preceding paragraph up to the time when a *de jure* government had been established after a particular revolution:

4. By forces arising from the disbandment of the Federal Army ;

5. By mutinies or risings or by insurrectionary forces other than those referred to under subdivisions 2, 3 and 4 above, or by brigands, provided that in each case it be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question, or to punish those responsible for the same ; or that it be established in like manner that the authorities were blamable in any other way.

Now, during the period in question there were no less than ten persons who claimed to be President of Mexico and to represent a government, though it is true that one held the position for only 45 minutes. Those who actually exercised the power of government were only Porfirio Diaz, Francisco Madero, Victoriano Huerta and Venustiano Carranza. But General Orozco, Emiliano Zapata and Francisco Villa led insurrections at various times, held large parts of the country and purported to set up governments. The Mexican Agents recognized Diaz, Madero and Carranza, but said Huerta was a usurper and the others merely rebels, so that they could only be included under paragraph (5), in which case the Mexican Government could only be liable if shown to have been negligent, and it was a decision in this sense in the Santa Isabel case, where a number of American engineers were taken from a train and murdered by a Villa officer, which wrecked the American Special Claims Commission. As might be expected, the decisions of the various Commissions on these questions are difficult to reconcile, and Mr. Feller's comments on them are interesting, but the problem was an historical rather than a legal one, and the opinions have little importance from the point of view of jurisprudence.

So far as procedure was concerned, authority was given to the Commissions to formulate their own rules, and though much time was spent in doing this, no difficulties subsequently arose. But considerable divergences of opinion arose over questions of proof and rules of evidence. Most Continental nations, while generous in the way of accepting hearsay evidence, refuse to allow parties to a suit to be witnesses at all, and often exclude their relations, servants, etc., also, whereas under British and American law all witnesses are admissible, but second-hand evidence is rigorously rejected. However the U.S.A.-Mexican General Commission in the William A. Parker case by a unanimous decision laid down the broad principle that they were not to be bound by American or Mexican rules of evidence, and that "municipal restrictive rules of adjective law or of evidence cannot be here introduced . . . but the greatest liberality will obtain in the admission of evidence before the Commission with a view to discovering the whole truth with respect to each claim submitted." This rule was adopted with approval by all the other Commissions, the British Commissioner in the Cameron case going so far as to say that "it ought to be adopted by this and every other international Commission."

But, as our author points out, there is a great distinction between the admission and the evaluation of evidence, and here we find different views expressed. Thus whereas all the Commissions, though with some reluctance, accepted evidence given by the claimant himself in the form of affidavits or depositions, the United States-Mexican General Commission rendered awards on such statements even when uncorroborated, but Dr. Zimmerman, President of the British-Mexican Commission, laid down the principle, which he followed in numerous cases, that "although affidavits of the claimants cannot be rejected altogether, if unsupported they possess a very defective character, as they are sworn without the guarantee of cross examination, and only in cases of the rarest exception can they be accepted as sufficient evidence." By this decision he overruled dissenting opinions both of his Mexican colleague who considered that such evidence should be excluded altogether, and of the British Commissioner who urged that in cases of injury arising from torts or criminal acts the plaintiff might be the only possible witness, and therefore his statements should be accepted if they appeared reasonable in view of the surrounding circumstances. In general all the Commissions, except the American, rejected claims based on the uncorroborated evidence of the claimant.

Another principle laid down in the Parker case was that the whole onus of proving his case did not lie upon the plaintiff, for before an International Commission it was the "duty of the respective Agencies to co-operate in searching out and presenting to the tribunal all facts throwing any light on the merits of the claim presented." In our author's view the Agents generally complied with this duty, and in cases where the claim depended on the negligence of the Mexican Government in failing to take steps to prevent the injuries caused or to punish the criminals, all the Commissions except the Italian were prepared to give awards against the Government when it was shown that the facts were brought to the knowledge of the authorities, and the Agents failed to produce evidence that was in their possession showing what steps actually were taken.

Coming to matters of substantive law, difficulties arose before all the Commissions as to the "claimant." It is a fundamental principle of international law that the claim is made by one State against another, not by the person injured, but the right of the State is by a well-recognized practice restricted to the injury caused to or the loss suffered by its national. Thus the Italian-Mexican Commission rejected several claims made by the Italian Government on its own behalf by reason of the killing of Italian citizens whose heirs could not be identified. Numerous cases turned on the nationality of the claimant at the time when the claim arose and at the time of the award. A typical dilemma existed, which Mr. Feller admits to be impossible of a logical solution, when the liability of Mexico arose as provided by paragraph (5) above from a failure to make a diligent effort to apprehend the assailant of an alien or to prosecute and punish him if caught. For the injury to the individual arises from the crime itself and can scarcely be said to be affected by the question whether the criminal is punished or not, though this is the only basis of the right to claim by the State. Almost all the Commissions, however, ignored the fallacy, and once they had decided that liability existed on the ground of negligence of this character, they awarded damages based on the actual loss suffered.

And this question of the rights of the individual and the State brings us to the consideration of the most important problem with which the Commissions had to deal, both from the point of view of the amount of the claims, which in several cases amounted to over a million pounds, and the effect of the decisions on future international disputes, namely the validity of what is known as the Calvo Clause; and Mr. Feller devotes the whole of one of his most interesting chapters to this matter.

This clause, so called after the Argentinian jurisconsult Calvo, in its typical form is a stipulation in a contract between an alien and a government whereby the alien agrees not to call upon his own government for protection or assistance in all matters relating to the contract. There have been a number of conflicting decisions on the clause by previous international commissions, some holding it to be absolutely null and void on the ground that an individual cannot contract away the right of his government to protect him, whereas others have accepted it as a bar to an international claim.

The first case involving the Calvo Clause before the Mexican Commissions was the North American Dredging Co.'s case before the U.S.A.-Mexican General Claims Commission. This Commission under the presidency of Dr. van Vollenhoven unanimously sustained a motion of the Mexican Agent to dismiss the claim. The Company had entered into a contract with the Mexican Government to dredge a harbour, which contract contained a clause as follows: "They [*i.e.* the Company] shall not claim nor shall they have, with regard to the business and the interests connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of any foreign diplomatic agents be permitted, in any matter related to this contract." The Commission took the view that the claim was based on a breach of the contract and that it was the duty of the claimant company to use the remedies existing under the laws of Mexico, which admittedly they had not done. Our author is somewhat critical of the decision, more particularly as Art. 6 of the various conventions provided that "no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim," and he quotes an opinion of Prof. Borchard in the *American Journal of International Law* to the same effect. The British Government, however, in reply to a questionnaire sent by the League of Nations Preparatory Committee for the codification of international law, stated that they accepted the decision as good law, and that "whereas a stipulation which purports to bind the claimant's government not to intervene in respect of violation of international law is void, there is no rule to prevent the inclusion of a stipulation in a contract that in all matters pertaining to the contract the jurisdiction of the local tribunals shall be complete and exclusive."

This case was followed by three decisions of the British-Mexican Commission, the Mexican Union Railway, Ltd., the Vera Cruz (Mexico) Railways, Ltd., and the Interoceanic Railway of Mexico, Ltd. and others, all reported in *Decisions and Opinions of the Commissioners*, published by H.M. Stationery Office, at vol. i, p. 157, and vol. ii, pp. 11 and 118 and 207, which Mr. Feller finds still more difficult to justify. In all these cases, although the wording of the Calvo Clause was much wider than in the American case and the claims were not based on any breach of contract, but on damage due to revolutionary acts, the majority of the Commission accepted the motion to dismiss. Two successive British Commissioners delivered strong dissenting opinions, accepting the Dredging Co. decision, but distinguishing those with which they were dealing. In one further case, however, that of the El Oro Mining and Railway Co., Ltd., the same Commission (this time with the Mexican Commissioner dissenting) refused a motion to dismiss, as the Company had filed a claim before the National [*i.e.* the Mexican] Claims Commission, and though nine years had elapsed there had been no hearing. That, in the opinion of the Commission, constituted a denial of justice which gave them jurisdiction.

If then we may take the careful and learned judgments of Dr. van Vollenhoven and Dr. Zimmerman as being the last word on this controversial subject, it may be assumed that, where a Calvo Clause has been accepted in a contract, the government of the foreigner who has suffered damage of any kind to his property, which he has obtained or created under the contract, will not espouse his cause unless he has exhausted without success all local means of redress.

In his final summing up of the question Mr. Feller says that though the weight of international opinion is to the effect that such a clause in its widest form is invalid, still it may be desirable to recognize it, especially in the case of a concession, in order to render it possible for countries like Mexico without capital to exploit their natural resources with foreign help, without giving the alien a privileged position over its own nationals, and that therefore each case of the kind should be considered on its merits with particular regard to the subject-matter of the contract. And here perhaps the matter may be left.

Other questions upon which Mr. Feller offers comments and compares the views of the different Commissions are proof of nationality, inheritance and assignability of claims and measure of damages, and in his final chapter he regretfully admits that taken as a whole the Commissions can hardly be said to have been a success, especially from the point of view of the claimants, and suggests that lessons can be drawn from them for governments which may wish to make similar conventions in the future.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L., LL.D.]

The Abdication and the Dominions.—Two features of great constitutional importance marked the regrettable abdication of the King. The first was a proof of his full and ready acceptance of the rule of constitutional government. The suggestion made that the King should refuse to abandon the marriage he contemplated and seek to find ministers to support it, giving them a dissolution, ignored the fundamental principle that the sovereign may refuse the advice of ministers only when he has reasons of a very substantial nature to believe that they do not represent the will of the electorate. In declining to contemplate any controversy with ministers, His Majesty plainly acted with the fullest propriety; there was never any doubt that Mr. Baldwin represented the will of the electorate, not merely as regards a marriage in the ordinary way but also as regards a morganatic marriage, apart from the inevitable doubt whether the first divorce of the lady in question was granted by a court competent to decree it in the view of English law. That the Dominions should equally have disapproved either suggestion was inevitable: religious objections in the case of Canada and even Australia were overwhelmingly strong. There has never been any recognition in England of morganatic marriages. The marriages of princes in defiance of the Royal Marriage Act, 1772, have been simply null and void, and in law have been without any status whatever, whereas the marriage suggested as possible was one in which the wife of the sovereign would have been married but would not have become Queen nor her issue royal.

The Statute of Westminster.—The ambiguities and difficulties of the Statute of Westminster became very obvious in the unexpected crisis. The necessity of immediate action was accepted on all hands, and common sense found a solution in the King's Declaration of Abdication Act. It was patent that, in the absence of any precedent, the Act of Abdication could not be deemed to be effective without legislation, which meant that the abdication must be legalized and the succession thereupon defined. This brought into operation the preamble to the Statute which requires for the alteration of the law touching the succession the assent of the Parliaments of the Dominions as well as that of the United Kingdom. No doubt the framers of this provision contemplated the leisurely procedure under which the Statute itself was brought into being. The Commonwealth of Australia alone was able effectively to carry out the procedure, for the Parliament was summoned and resolutions were passed by both Houses contemporaneously with the proceedings in Britain. In Canada, as Parliament could not meet in time, the government ignored the preamble for the moment and fell back on s. 4 of the Statute which permits legislation by the Imperial Parliament at the request and consent of the Dominion concerned, leaving it for Parliament later on to approve the request.[1] For New Zealand neither such step was necessary. The government did not feel that Parliament could be called together to assent, and on the other hand the Statute of Westminster has never become applicable to New Zealand, so that Imperial legislation needs no formal request and consent, but merely assent to action under established constitutional principles. For South Africa the case was again different. Parliament could not meet in time to assent, and s. 2 of the Status of the Union Act, 1934, prevents the operation in the Union of any Imperial Act until extended to the Dominion by Dominion legislation. The way out found was ingenious and dignified. The Union government assented to the passing of the Imperial Act, but that would not have given immediate effect in the Union to the change of ruler. But s. 5 of the Statute of the Union Act, 1934, which is a Union Act, defines "heirs and successors" as applying to the King's heirs and successors in the sovereignty of the United Kingdom as determined by the laws relating to the succession of the Crown of the United Kingdom. It will be seen thus that any alteration in the British Acts indirectly is at once effective under Union legislation in the Union, so that the new sovereign could legally be proclaimed King forthwith in the Union without derogating from the sole right of the Union to affect the succession by its own legislation.

The Royal Marriage Act, 1772.—The exclusion of the former sovereign and his issue from the operation of the provisions of this Act was inevitable, but it must be asked whether the maintenance of the Act in full force can be justified. It means that with each generation an increasing number of persons come into being whose marriages are invalid throughout the British dominions if the rules laid down in the Act are not observed. In the case of families such as that of the Duke of Cumberland the rule is clearly absurd, and it might work hardship, apart altogether from the fact that it contradicts the just and proper rule that a marriage valid according to the *lex loci contractus* should be valid everywhere. The restriction of the Act to the children and grandchildren of the reigning monarch, to his brothers and sisters, nephews and nieces, would probably meet all reasonable needs.

The Irish Free State.—It was to be expected that Mr. de Valera should take the opportunity to effect his favourite purpose, the elimination of the Crown from the internal government of the State, and its recognition in the sphere of international affairs only. This is the famous plan of external association which figured in the controversy over the Treaty of 1921, and to which he appears to have been consistently loyal. It cannot be asserted that in practice the new position alters the former state of affairs. To give the Chairman the right to sign Bills, summon and dissolve Parliament in lieu of a nominal Governor-General who acted merely on the instructions of ministers, and to transfer to the Executive Council the appointment of judges and members of the Military Tribunal under the Constitution (Amendment No. 17) Act, 1931, are provisions formally interesting, in practice of negligible consequence. The fact that the Crown is no longer in name connected with internal government is doubtless a matter of deep regret to a large minority in the State,[1] but the mischief for them was done when the Free State severed the bond of allegiance with the King and made British subjects as such aliens in the State. It is to be regretted that the necessity of swift action precluded any real amendment of the Constitution to strengthen its safeguards against hasty action.[2] It is significant that so vital alterations as regards forms as these could be passed in a few hours without a popular mandate, and that in its present form the ministry remains virtually free from any constraint beyond its own will. In external affairs the *status quo* secured by Mr. Cosgrave will remain. The King will play a part in treaty making and diplomatic and consular appointments ; he will act direct on advice from ministers, but he will still represent the State to the outer world, and the State will remain a member of the Commonwealth pledged to consultation in foreign affairs. It is significant that Mr. de Valera effectively countered the proposal of the opposition to recognize the insurgents in Spain as the legitimate government, thus manifesting his determination to maintain cordial relations with the Commonwealth in spite of the temptation to win the approval of the clerical hierarchy by action alleged to be in the interests of the Roman Catholic Church.

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[1] See Mr. MacKenzie King, House of Commons, Jan. 18, 1937. Under the British North America Act, 1867, s. 3 and the Commonwealth of Australia Constitution Act, 1900, s. 2, the change by the British Act automatically applied.

The Legality of the Changes in the Constitution.—The elimination of the Crown from internal government is palpably a complete departure from the Treaty of 1921, which is the supreme law of the State under the Constitution and the supremacy of the Constitution over legislation was asserted by the members of the Supreme Court in *The State* (*Ryan*) v. *Lennon* in 1934.[3] But the decision of the Privy Council in *Moore* v. *Att. Gen. for the Irish Free State*[4] in 1935 that since the passing of the Statute of Westminster the State is not bound by the Constitution can hardly be disregarded by the Supreme Court, not because it is binding on it nor because it rests on reasoning which can appeal to the Court, but because to declare the new legislation invalid would simply be followed by measures to swamp the Court and obtain its reversal of view. From the contractual aspect it may be claimed by the State that the abdication of the King created a fundamentally new position in which Britain could not claim the continuation of the Treaty unaltered, and that all that is essential has been done in continuing the position of the Crown in external relations.

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[1] The objection was also pressed in the Dáil that reunion with Northern Ireland would be rendered more difficult.

[2] The creation of a second chamber and the establishment of some measure of independence of ministers in an elected head of the State had been suggested by Mr. de Valera earlier, but such changes would need a popular vote.

[3] [1935] I.R. 170.

[4] [1935] A.C. 484.

The Declaration of War and Neutrality.—There must, however, be noted one matter in which suitable provision for the exercise of the power of the Crown has not been made. The essential functions of declaring war and neutrality are not included in those matters in which the King is empowered to act on the motion of the Executive Council.[1] As the executive power in general is transferred to the Council,[2] the position thus appears to be that the right to declare war or neutrality rests with the Executive Council without invoking the royal name, while the making of peace as part of the treaty power will be carried out with due use of the Crown. It may indeed be said that in point of law the Executive Council has full authority to make treaties and need not use the procedure through the Crown, which is facultative. But this argument would be misleading. The Executive Council can make agreements with foreign states, but such agreements would inevitably be regarded as governmental accords as opposed to treaties proper, which, so long as Art. 1 of the Constitution remains in existence, can be made only in the name of the head of the British Commonwealth of Nations. It is very significant that in this respect there is a vital distinction between the Free State and the Union of South Africa. The government of the Union has the full legal authority to make treaties in the King's name, even if His Majesty disapproves. In the case of the Free State, treaties may be made only through the King, and, though the King can act only as advised by ministers, he cannot of course be compelled to act at all. It is conceivable that the Executive Council deliberately desires to omit the King in deciding on neutrality, for instance in a British war ; but the position would be highly anomalous and it may be that the confusion as to authority is simply due to hasty drafting. That the Bills were rather too rapidly prepared may be seen from the fact that the present Governor-General, though deprived of his functions, is not expressly deprived of the office and will presumably be entitled to draw his salary[3] pending further adjustment by amending legislation. It is dubious also whether machinery exists for summoning the Dáil after a general election, the objection being that under the new regime it falls to him to summon it, and on dissolution he ceases to be Speaker. The objection is rather technical, as he might at one and the same time dissolve and summon on analogy with British practice, but that is of minor importance, and amendment has been promised. If and when a new elected head of the State is created, it will fall to him no doubt to dissolve and summon the legislature.

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[1] Executive Powers (External Relations) Act, 1936. This was passed after the amendment of the Constitution and assented to by the Chairman. It accords formal recognition to the demise of the Crown.

[2] Constitution (Amendment No. 27) Act, 1936, amending Art. 51 of the Constitution. This was the last Irish Act assented to by the Governor-General for King Edward VIII, who remained King in the Free State until Dec. 12, a day after his reign ceased elsewhere.

[3] His salary is provided for until March 31, 1937. No successor can be appointed, as Art. 60 of the Constitution is repealed. Mr. de Valera stated that some further amending legislation would be brought forward in 1937. *Irish Independent*, Dec. 12, 1936.

The Dominions and the Non-intervention Agreement.—The difficulty of conducting foreign relations is signally illustrated by the fact that the Irish Free State alone has accepted the obligations of the agreement against intervention by which France and Britain have endeavoured to localize the conflict in Spain between the recognized government and the insurgents. The British decision, without waiting for like action by the other powers, to extend its non-intervention to the extent of forbidding the transport to Spain by British vessels of munitions of war necessitated legislation, the Merchant Shipping (Carriage of Munitions to Spain) Act,[1] which raises issues of considerable difficulty. It was, of course, necessary to exclude from its obligation ships registered in the Dominions, and this raised two points. Should the Dominions have been consulted before the measure was enacted? What were the rights of ships of Dominion registry carrying munitions to Spain? It is curious that it was denied for the government that any obligation to consult the Dominions existed, but, as they were informed, the point is not material, save that merchant shipping is obviously one of those issues on which complete intercommunication of views was demanded by the Imperial Conference of 1930. On the second point, Mr. Runciman suggested that the British Navy would not protect Dominion ships carrying munitions from search by insurgent cruisers. This doctrine was plainly impossible. It ignored the fact that such cruisers, while the insurgents are not recognized by the British Crown, are piratical vessels if they attack in any way British ships at sea, and that no more fatal blow could have been delivered at British relations with the Dominions than the spectacle of the British Navy watching with indifference the seizure of Dominion shipping. Mr. Eden therefore gave the necessary assurance that no orders had been given to the Navy to fail to protect Dominion shipping. There would, however, arise a very difficult position if the British Government accorded belligerent rights to the insurgents unless the Dominions followed suit, since the visit of British ships would in case of a blockade be legal, that of Dominion ships illegal. Yet another difficulty is suggested by the issue of control of volunteers.[2] So far the Free State has taken no steps under the Foreign Enlistment Act, 1870, to prevent the departure from its shores of those eager to assist the rebels against the government of a friendly State. No reason for this failure seems to exist in law unless the Irish view is that the Act is restricted to cases where war has been recognized by the Crown to exist between a government and rebel forces. But this interpretation seems unduly narrow, for it seems incredible that it should be legal for British subjects to accept commissions in rebel forces and to leave England bent on the destruction of the government of a friendly State. Another point of doubt left obscure is the position of all British shipping in territorial waters. It would seem clear that they are entitled to British naval protection if attacked by pirates when proceeding to ports declared open to trade by a friendly government if that government approves of British action. It is clearly impossible to assert that a government is impotent to protect its vessels from pirates, because the pirates are operating within the territorial waters of a friendly power which for the moment is not in a position to prevent their action.

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[1] 1 Edw. VIII, c. 1.

[2] Keith, *The Spectator*, Dec. 4, 1936. The British Government in January 1937 adopted the view that the Act applied in a civil war without recognition of belligerency. See *R.* v. *Carlin*, (1870) 6 Moo. P.C. N.S. 510.

Nemo tenetur se ipsum accusare.—In *The State* (*McCarthy*) v. *Lennon and Others* [1] the remarkable effect of the Constitution (Amendment No. 17) Act, 1931, has been further elucidated by the Supreme Court. The issue was the validity of the conviction of the accused by the Constitution (Special Powers) Tribunal of an offence, the only evidence against him being an account of his movements and action given under compulsion to an officer of the police force, the refusal to give such an account being made an offence by s. 15 of Art. 2A of the Constitution, which was added by the Act of 1931. Kennedy C.J. took the *prima facie* view that information obtained in private from a prisoner by a police officer under this form of compulsion could not be adduced in court as evidence upon which he could be convicted of an offence. He denied therefore the conclusive force ascribed by the prosecution to the leading English case of *R.* v. *Scott* [2] in which it was held that answers on oath to questions given in the Court of Bankruptcy under compulsion could be used in a criminal prosecution, even if it were deemed to have been rightly decided. But Fitzgibbon J. pointed out that the English case, which had been followed by the Privy Council in the Quebec case of *R.* v. *Coote* [3] and extended to statements made before Fire Marshals, was effective authority for the power of Parliament to override the maxim, and that it was competent for Parliament to take away the safeguard of an oath and the presence of anyone superior to a member of the Gárda Siochána. At the same time he negatived the suggestion that natural justice can be pleaded to invalidate a statute, as once suggested by Coke [4] and by Holt [5] C.J., and adhered to the contrary view of Lord Moulton in *Local Government Board* v. *Arlidge* [6] and of Willes J. in *Abel* v. *Lee*,[7] though he expressed, as on other occasions, his surprise at the action of the legislature. Murnaghan J. concurred in his reasons, and the Court therefore dismissed the conditional order for *habeas corpus* and *certiorari* by affirming the unanimous decision of the Court below. Murnaghan J., it may be added, expressed no opinion on the issue whether *certiorari* would lie to enable the Court to inquire into the sufficiency of evidence before a tribunal which had jurisdiction in the issue.

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[1] [1936] I.R. 485.
[2] (1856) Dears. & B., 47.
[3] 12 Cox, C.C. 557.
[4] *Bonham's Case*, 8 Rep. 107 a, at p. 118 a.
[5] *City of London* v. *Wood*, 12 Mod. 669, at p. 687.
[6] [1915] A.C. 120, at p. 150.
[7] L.R. 6 C.P. 365, at p. 371.

The Status of Saorstát Éireann and its Attorney-General.—In *Att.-Gen.* v. *Northern Petroleum Tank Co., Ltd.*[1] the issue was raised whether the Free State was a person in the eyes of the law, capable of owning property and whether its rights could be asserted by the Attorney-General. On the latter point the decision of the Privy Council in *Wigg and Cochrane* v. *Att.-Gen. of Saorstát Éireann*[2] was naturally accepted by the Court; it has on several occasions already been relied on in the courts. Nor was the validity of the contention that the State could not be treated as owner of the pipe-line from the reservoir at Cobh to Spike Island, as it had not been transferred by the Provisional Government (Transfer of Functions) Order, 1922, accepted by the Court. It insisted instead that the whole system was part of the soil and fabric of the Irish Free State, and no more needed transfer than the government buildings in Merrion Square. It accordingly ruled that damage done by a ship to the pipe-line was a legitimate ground for the award of damages to the State.

The Application of British Acts in the Free State.—Very interesting is a decision on this issue in *Irish Transport and General Workers' Union* v. *Transport and General Workers' Union and Others.*[3] The point decided was whether after the coming into force of the Constitution it was possible for s. 6 of the Trade Union Act (Amendment) Act, 1876, to apply in the Free State. Under that section rules recorded in England, Scotland or Ireland according to the place of registration of a union must also be recorded in the other countries if they are to have effect there. It is not surprising that the Court ruled that it was no longer practicable to treat the Act as effective in the Free State so as to render valid there the registration of the rules of the defendant union in 1925, under which it was to operate in the State as the Amalgamated General and Transport Workers' Union. It was held, therefore, that the recording of the rules in the State was of no legal effect. But in consequence it was impossible for the plaintiffs to obtain any substantive relief from the defendants in respect of any injury effected by their operations in the State, on the ground, which is obviously conclusive, that the Trade Disputes Act, 1906, by s. 4 (1) forbids the bringing of an action of this kind against an unregistered union. It appears thus that, if the defendants desire to obtain registration in the State, they will have to apply under Irish law, when the Registrar will be able to decide whether they can assume effectively the title desired. It affords another interesting example of the difficulties due to the failure on the part of the Parliaments to provide effectively for the many anomalies inevitable on the destruction of the unity of the United Kingdom.

The Recall in Alberta.—Among the innovations of Alberta the most interesting is perhaps the decision to permit the recall of members of the

[1] [1936] I.R. 450.

[2] [1927] I.R. 285.

[3] [1936] I.R. 471.

legislature who have ceased to please their constituents.[1] The idea, of course, is derived from the United States, and is in accordance with the view that a member represents not his country at large, as Burke contended, but the locality which elected him. The procedure takes the form of a petition for recall, forms for which must be issued by the Clerk of the Executive Council on the request of ten persons whose names appeared on the voters' roll for the last election. If the petition is signed by at least 66⅔ per cent. of the voters, it may be lodged with the Clerk, who informs the member and the Chief Justice. The latter holds an inquiry and, if satisfied that the procedure prescribed has been duly observed, reports that the seat is vacant. A new election falls then to be held, when the recalled member is eligible to stand. The number of votes required seems to render recall very unlikely, but it may be noted as rather unsatisfactory that, while the case against him is to appear on the petition, no reply is to be printed thereon. In the United States, where the recall is allowed, it is usual to allow both sides to be set out, but the percentage of voters there is often as low as 25. If this number is reached, the person affected may resign or allow his name to appear as a candidate at a new election together with those of other aspirants. It is doubtful if the new idea will fare better than that of the initiative which at one time seemed likely to be widely adopted.[2]

Broadcasting in the Commonwealth.—It is a matter for satisfaction that the High Court has been able to find that the power of Parliament to make laws under s. 51 (v) of the Constitution with respect to postal, telegraphic, telephonic and other like services is sufficiently wide in ambit to cover broadcasting. The issue thus tardily decided in *The King* v. *Brislan, Ex parte Williams*,[3] has long been debated academically in the Commonwealth, but there has been no disposition to take up the matter on the part of the States as an intrusion on their rights, and it is significant of the general acquiescence in the existence of the rights of the Commonwealth that in the case in question none of the States intervened in order to support the invalidity of the right claimed by the Commonwealth under the Wireless Telegraphy Act, 1905–19. The point against the validity of Commonwealth control was most effectively put by Dixon J. in his sole dissenting judgment. The difficulty in his view lay in regarding broadcasting for general amusement, instruction, information or edification as a service which forms part of or is like postal, telegraphic and telephonic services. Dixon J., while recognizing the similarity of the apparatus employed in ordinary wireless telegraphy and in broadcasting, felt the essential distinction between this form of public performance, recital or utterance and the messages sent to one or many as such. In postal, telegraphic and telephonic services the essential characteristic was intercommunication, the provision of means by which one individual could establish communication with another, and this characteristic was essentially lacking in broadcasting. The rest of the Court took the simpler view that broadcasting could be deemed akin to telephonic services, and be included in the terms "other like services." Their conclusion was certainly aided by the ruling of the Privy Council, *In re Regulation and Control of Radio Communication in Canada*,[1] which establishes for that Dominion the doctrine that the control of radio communication is included in the power of the federation to control telegraphs and other works and undertakings connecting the province with any other province or extending beyond the limits of the province. That decision supplemented the earlier decision in *Toronto Corporation* v. *Bell Telephone Co. of Canada* [2] that telegraphs included telephones, which were developed after the enactment of the British North America Act, 1867. It had already been decided in *Att.-Gen.* v. *Edison Telephone Co. of London* [3] that Edison's telephone was a telegraph within the meaning of the Telegraph Acts, 1863 and 1869. The progress of modern invention has similarly taxed legislators and courts in the United States, where it was held by the Supreme Court in *Pensacola Co.* v. *Western Union Telegraph Co.*[4] that, under the power of the Constitution, Art. I, s. viii, to establish post offices and post roads, and that to regulate foreign and inter-state commerce, the federation had full authority to control telephonic messages. It is satisfactory to have the issue disposed of in a manner so definitive.

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[1] The Legislative Assembly (Recall) Act, 1936.

[2] Keith, *Responsible Government in the Dominions* (ed. 2), i. 303–5.

[3] (1935) 54 C.L.R. 262.

The Control of Air Navigation.—In the case of air navigation within a State the Commonwealth has not been fortunate enough to have its powers upheld, for the Air Navigation Act, with the regulations made thereunder, has been held *ultra vires*, a result not unexpected, for the Commonwealth originally hoped to induce the States to confer on it legislative authority to remedy its own obvious lack of power. What, however, has been of special interest is the fact that Evatt and McTiernan JJ. were prepared to hold that, if the regulations impugned had been in accord with the Air Navigation Convention, they would have been valid, the Commonwealth having power to implement the convention under its authority as to external affairs, which is thus given an extent wider than it has been usual to recognize. The majority, however, of the Court did not commit itself to this view, and it is open to two serious objections. Firstly, it is undesirable that Australia should be bound down to legislation in precise accord with the Convention when mere intra-State navigation is concerned, which is a matter of domestic concern. Secondly, it is undesirable that under the external affairs power the Commonwealth should be enabled partially and imperfectly to impinge on State power. The decision of the government to include the topics of air navigation and aircraft in those to be submitted by referendum to the electorate is thus justifiable. It naturally refused to add to the referendum trade and commerce, industrial matters, broadcasting and television as desired by the opposition, on the sound ground that it was sufficient to ask for aviation powers in addition to control of marketing authority, as has been rendered necessary by the Privy Council decision in *James* v. *The Commonwealth*.[1] The Prime Minister also wisely abandoned, under threats from the rank and file of the party of refusal to vote supply, the idea of holding a general election simultaneously with the referenda in order to give the ministry a mandate for the representation of Australia at the Imperial Conference of 1937.

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[1] [1932] A.C. 304.

[2] [1905] A.C. 52.

[3] (1880) 6 Q.B.D. 244.

[4] (1877) 96 U.S. 1.

Actions against the Commonwealth.—It is a sign of the great generosity with which the subject is treated in the Commonwealth when he has claims in contract against the government that in *Heimann* v. *The Commonwealth* [2] it was ruled that the action may be brought in a State court and that discovery against the Commonwealth may freely be ordered under the equity jurisdiction of the Supreme Court of New South Wales. The attempt to deny such a right, on the score that courts do not aid common informers, was ruled against on the ground that the claim in question was based on a contract with the Commonwealth to provide information leading to the conviction of persons for the evasion of customs duty and recovery of the duty evaded and the penalties for evasion.

The Restrictions on Preferential Treatment of States.—An interesting judgment as to the scope of s. 99 of the Constitution is given in *Crowe* v. *The Commonwealth* [3] where it was ruled that the Dried Fruits Export Control Act, 1924–35, was not invalid as regards s. 4 because the Board thereby constituted is composed of two persons elected by growers in Victoria as opposed to one elected by growers in certain other States. The reasoning by which the Court dismissed the claim of invalidity was that no tangible or material advantage was given by this provision, which was due merely to the proportionate number of producers, and that the Board had no power to grant a preference to any State or part thereof. A much more difficult case presented itself in *Elliott* v. *The Commonwealth* [4] where under the Transport Workers' (Seamen) Regulations provision was made for designating ports at which workers could be employed only if duly licensed, and ports in four States only were designated. The majority of the Court held that there was no discrimination, Latham C.J. insisting that the criterion was whether localities chosen were for the purpose of the discrimen taken as States or portions thereof. Evatt J. dissented on the score that employers in the selected ports were given command of "servile labour" and so a discrimination existed, but it is difficult to follow his attempt to bring the matter within s. 99 of the Constitution, and McTiernan J. on this occasion agreed with the majority, though Dixon J. held the regulations invalid.

In *Crowe's Case* [5] the fact that certain actions done outside Australia were penalized was held, following *Croft* v. *Dunphy*,[6] to be valid, as the acts affected were connected effectively with the Australian subject-matter, and the suggestion of excessive delegation of legislative power was met by reliance on *Dignan's Case*.[1] It must be admitted that the preference issue thus dealt with is extremely difficult. But the view of the majority in *Elliott's Case* is supported by the Chief Justice's pertinent observation that, if a wider view were taken, it would mean that the Court must deny the power to select ports of entry under the Customs Act, and to prescribe ports where pilotage is compulsory under the Navigation Act.

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[1] (1936) 55 C.L.R. 1. See *Journ. Comp. Leg.*, Third Series, vol. xviii, pt. iv, pp. 281–2.

[2] (1935) 54 C.L.R. 126.

[3] (1935) 54 C.L.R. 69.

[4] (1936) 54 C.L.R. 657.

[5] 54 C.L.R., at pp. 85, 93.

[6] [1933] A.C. 156.

Freedom of Trade.—The issue of s. 92 was once more the subject of discussion in *Duncan* v. *Vizzard*[2] where the validity of the State Transport (Coordination) Act, 1931, of New South Wales was called in question on the score that a regulation under it limited competition by motor transport with railway transport to a distance of fifty miles, which was asserted to be an indirect means of differentiating between intra-State and extra-State transportation. But on the authority of *R.* v. *Vizzard*[3] and other cases this contention was easily disposed of by the Court, Starke J. as usual dissenting. A more difficult point was involved, in *Australasian Scale Co., Ltd.* v. *Commissioner of Taxes* (*Queensland*)[4] where the Queensland Income Tax Act, 1924, provided that, if the profits made by a business in that State could not satisfactorily be determined, the taxable income should be assessed by the Commissioner at a sum bearing the same proportion to the total profits as the sales in Queensland to the total sales, or, if there were no sales, in the proportion of local to total revenue. The High Court held the legislation valid, but the justices were not in agreement in their reasons. The most plausible view seems that of Rich and Dixon JJ., who held that the ascertainment of the portion of profits by the ratio between the volumes of sales did not impose any burden on sales made in inter-State commerce. Starke J. held that the tax applied after inter-State trade had ceased, Evatt and McTiernan JJ. justified the law on other grounds, but incidentally insisted on the doctrine that, even if profits made outside the State were taxed, this was unobjectionable, as no territorial limitation affected legislation if it were for the peace, order and good government of Queensland.

Limitations on Taxation Laws.—It is curious that no Act has yet been successfully challenged on the score that it offends s. 55 of the Constitution which renders void any provision in a taxation Act dealing with matters other than taxation and requires that such Acts should be confined to one subject. The Income Tax Assessment Act, 1922–34, by s. 67 punishes failure to return income correctly by imposing a minimum liability to pay £1 or double the amount which would have been payable in addition to that assessed on the incorrect return. Rich and Dixon JJ. in *Jolly* v. *Federal Commissioner of Taxation*[5] incidentally pointed out that this provision seems to deal with something other than taxation of income. If it is really a tax, it seems at least as regards the minimum of

[1] (1931) 46 C.L.R. 73.
[2] (1935) 53 C.L.R. 493.
[3] (1933) 50 C.L.R. 30.
[4] (1935) 53 C.L.R. 534.
[5] (1935) 53 C.L.R. 206.

£1 to be a tax on the default of the taxpayer. In the alternative the section may be regarded as exceeding the legislative power of the Commonwealth incidental to taxation by assigning the power to penalize to a body not vested with judicial power proper. The case not being intended to raise the issue, they did not finally decide it but left it open for later discussion. What was decided was that the Board of Review can on appeal from the Commissioner exercise the latter's power on fit occasion to remit the additional tax imposed on defaulters.

Prerogative and Statute.—The old issue of the relations of prerogative and statute were once more considered in *The King* v. *Bradley*,[1] where the point involved was the question whether an offence affecting coinage was excluded from the jurisdiction of General Sessions as a crime against the King's prerogative or government under s. 187 (iv) of the Justices Act, 1928, of Victoria, which is based on the Quarter Sessions Act, 1842, of the Imperial Parliament. The High Court had no difficulty in upholding the right of General Sessions to deal with such offences on the ground that the accused were charged under a specific section of the Crimes Act, 1914–32, of the Commonwealth, and that, while the offence was one also against the prerogative, where statute intervened, it controlled the issue, as held by the House of Lords in *Att.-Gen.* v. *De Keyser's Royal Hotel.*[2] It was also pointed out that in England Quarter Sessions freely dealt with coinage cases, save where the offences were felonies punishable by penal servitude, which were excluded from their jurisdiction by a provision in the Act of 1842 not repeated in the Victorian Act.

Industrial Arbitration.—The jurisprudence of the High Court on this topic continues to be extensive. It has definitely protected State Industrial authorities against undue interference by the Commonwealth Court of Conciliation and Arbitration by insisting[3] that orders to them not to deal with matters must be specific, and it has pointed out that under the Commonwealth Conciliation and Arbitration Act, 1904–34, there is no power to prevent a State authority dealing with persons who are not parties to the industrial dispute of which the Commonwealth Court has cognizance and who are not bound or liable to be bound by an award made or to be made in the matter. Even more important is the ruling in *Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association*[4] that despite the repeal by the Commonwealth Conciliation and Arbitration Act, 1930, of the clause penalizing strikes and lock-outs, it is still open to the Court to lay down rules prohibiting action of this kind and to enforce them by penalties. The reason of Latham C.J., Rich, Starke and Dixon JJ. seems convincing in favour of the propriety of such provisions, but Evatt and McTiernan JJ. were wholly opposed to the exercise of the power, apparently because the prohibition of strikes imposed a form of wage slavery. It is curious to find, after so many years' working of conciliation and arbitration, that the barbarous process of strikes still has earnest defenders in the Labour party of the Commonwealth. The learned justices seem to have forgotten that the Court which lays down these rules is one which has the power to regulate every condition of employment justly, and that failure to respect its decisions is little else than a refusal to accept judicial determinations and a preference for force. The attitude is the more remarkable, for the Court has been consistently anxious to secure for labour the maximum share of the national wealth.

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[1] (1935) 54 C.L.R. 12.

[2] [1920] A.C. 508.

[3] *Australian Timber Workers' Union* v. *Sydney and Suburban Timber Merchants' Association*, (1935) 53 C.L.R. 665.

[4] (1936) 54 C.L.R. 626.

The Court and Persons not Parties to Disputes.—The High Court has in *Metal Trade Employers' Association* v. *Amalgamated Engineering Union*[1] interpreted in the most generous sense the right of the Court of Conciliation and Arbitration to issue awards vitally affecting persons who are not parties to the dispute brought before it, nor capable of presenting their case to it. It formerly ruled that the Court might grant preference to unionists, thus penalizing any non-unionists. It has further ruled that the Court may order that employers, if they employ non-unionists, may do so only on specific conditions, and such an order binds employers who do not employ any members of the union which is the party to the industrial dispute before the Court. In like manner the rules laid down by the Court bind employers who are members of the organization, party to a dispute if they become members thereof,[2] the doctrine of representation being evoked to justify this rather curious procedure. The line between such orders of the Court and legislation must appear very fine. In effect the Court exercises that legislative authority which the Constitution does not grant to the Commonwealth.

The Union of South Africa as a British Possession.—It is curious that it should have been necessary for General Smuts[3] to counter indignation expressed in Nationalist circles in the Union because of the decision of the Basutoland Court of Appeal that the Union is still a British possession.[4] The issue arose out of the conviction of an accused person on account of a crime committed on Union territory but within 500 yards of the boundary with Basutoland, action being authorized by s. 20 of the Fugitive Offenders Act, 1882, which permits apprehension, trial and punishment of any person committing an offence within the distance in question of the boundary between two British possessions in either of these possessions. Counsel for the accused argued from the Statute of Westminster and the Status of the Union Act, 1934, that the Union had emerged from the status of a British possession. But the Court very naturally refused to give effect to the contention. The definition of British possession in British legislation cannot, it is clear, be altered by anything done in the Union. If it is desired to make any change, the alteration must be carried

[1] (1935) 54 C.L.R. 387.

[2] *Amalgamated Engineering Union* v. *Metal Trade Employers' Association*, (1935) 53 C.L.R. 658.

[3] Oct. 7, 1936.

[4] Johannesburg, *Sunday Times*, Sept. 27, 1936.

out by an Imperial Act. On the merits, of course, there is no ground for alteration of the position, and it is curious that the decision should have been misunderstood in the Union, which it may be noted has for certain purposes classified the United Kingdom as a Dominion.

The Governor-General of the Union.—The decision to appoint Mr. P. Duncan Governor-General of the Union seems to have been precipitated by the desire to have a South African in office at the time of the Coronation in order to emphasize the complete distinction between the Crown of the United Kingdom and that of the Union.[1] That the precedent will be decisive for the future is probable, despite General Smuts's endeavour to reassure critics by asserting on November 20 that an appointment from overseas in future is not unlikely. It is significant that the *Cape Times*, which loyally supported the government in the passing of the Status of the Union and the Royal Executive Functions and Seals Acts in 1934, states that " a large section of the community holds the view that a cardinal blunder is being made in departing from the principle of appointing Governor-Generals from overseas," and goes on to say that " a precedent has been set which may have very serious consequences in the not distant future." The *Cape Argus* is also critical, recognizing that the step leads naturally to the abolition of the last link with Britain, the appeal to the Privy Council, and the organ of Dr. Malan's extreme Nationalist views naturally welcomes the change and proclaims the abolition of the appeal as the next objective of the republican movement. The essential point, of course, is that, with the appointment of a member of the government to the office of Governor-General the full power of sovereignty, external and internal, passes over to the ministry under the Royal Executive Functions and Seals Act, 1934, and there is no restriction on the powers of the government so long as the majority in the Lower House supports it. There is no constitution in the Empire in which there is anything comparable with the absolute lack of safeguards in the Union constitution. The wisdom of such a position may legitimately be doubted. That a small majority in Parliament should be able to authorize the government to proclaim neutrality or terminate the connexion between the King and the Union without even a mandate from the electors is in theory at least objectionable. It must, of course, be specially unfortunate in the eyes of the British minority in the Union, which recognizes that there is a steadily increasing sentiment in favour of the declaration of a republic.

The Bechuanaland Case.—It is naturally disappointing for Tshekedi Khama and the Chief Bathoen, representing the Bamangwato and the Bangwaketsi tribes, to find their effort to have declared illegal the two proclamations issued by the High Commissioner in 1934, [2] dealing with the creation of a tribal council for the administration of tribal affairs and the powers of jurisdiction of native chiefs, defeated by a technical defence. The essence of the case for the chiefs was that the proclamations were inconsistent with a verbal treaty alleged to have been made by Sir Charles Warren with the Bamangwato in 1885. Mr. Justice Watermeyer,[1] confronted with this claim, resorted to the procedure indicated in the Foreign Jurisdiction Act, 1890, and referred to the Secretary of State for Dominion Affairs the issue whether there were any limits to the jurisdiction of the King in the protectorate. The Dominions Secretary's reply asserts that His Majesty has unfettered and unlimited powers to legislate for the government and administration of justice among the native tribes of the Bechuanaland Protectorate, and that this power is not limited by treaty agreements.[2] The judge held that any competing claim that a law or custom was unalterable by the Crown was inconsistent with His Majesty's legislative power and jurisdiction and decided the case against the chiefs. Tshekedi had argued strongly that the proclamations had rendered inoperative the traditional administrative and judicial system and had contended that under the new regime it would be impracticable to maintain due order in the tribe. There can be no doubt of the legal necessity of the decision, but it is certainly permissible to wonder if any useful purpose was served in allowing suit to be brought when it was the intention of the government to secure a decision by the unquestioned authority of the Crown under the statute to decide for itself the extent of its jurisdiction.[3] The old adage that a man might not be judge in his own cause has ceased to be law; but that being so proceedings which must be a fiasco seem unfortunate. What was really at stake was the existence or not of any agreement such as was alleged, and a judicial pronouncement on the evidence would have been more valuable than the *ipse dixit* of the authority which was being called in question. The episode, taken in conjunction with the effective protests of the Bamangwato against accepting pecuniary grants from the Union of South Africa, is a striking indication of the necessity of keeping the protectorate indefinitely under the direct control of the Crown.[4]

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[1] So also the Union government has decided that legislation is requisite to provide for the King's Oath as King of South Africa at the Coronation; for the significance of this step see Keith, *The Spectator*, Jan. 15, 1937.

[2] The Native Administration Proclamation, No. 74, and the Native Tribunals Proclamation, No. 95.

Money Bills in the Bahamas.—Echoes of old constitutional disputes in the American colonies persist in the Bahamas, as shown by the resolution passed by four votes to two in the tiny Legislative Council of that colony in June 1936, asserting the right to amend any legislation whatever, whether or not that legislation deals with questions of finance or imposes or remits taxation. It is interesting to note that the mover of the resolution rested his case in part on the absence of any limiting words regarding the power of the Council in the Letters Patent on which rests the colonial constitution, and in part on the contention that there was no complete parallelism between the practice of the legislature in the colony and that of the Imperial Parliament. Thus the rule that only a minister may propose new taxation or expenditure is not in force in the Bahamas. An individual member cannot indeed do so directly, but the House may act in either case on the recommendation of a select committee without the initiative of the Governor.

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[1] Of the Cape Provincial Division, specially appointed to preside at the trial; 5 S.A.L.T. 132.

[2] Cf. the declaration made in *Tshekedi Khama* v. *Ratshosa*, [1931] A.C. 784.

[3] There is a parallel in the final authority of the Crown to decide as against any Indian State the extent and character of its paramount authority. See Keith, *Constitutional History of India*, 1600–1935, p. 446.

[4] See Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 76–8.

It must be admitted that, as the interesting memorandum prepared by Mr. Harcourt Malcolm, the Speaker of the House of Assembly, proves, the case for the Legislative Council is not convincing. When the Council was created, popular opinion in the American colonies was strongly against permitting the right of amendment of money bills to the Councils, and royal admonitions to the Assemblies to permit the Councils an equal voice in all legislative matters, including finance, were regularly disregarded.[1] In the same spirit, as early as 1767, the Assembly asserted its rights on the analogy of the House of Commons, and in 1903 the Council of the day conceded expressly that it could not amend the Appropriation Bill, though it protested against the Assembly including therein an item of £50 salary to the Provost-Marshal's bailiff, in view of the fact that the whole legislature had just passed an Act retrenching the like grant. But, though the Council asked for a ruling by the law officers, it did not trouble to press the matter when asked by the Secretary of State to supply the necessary information as to practice and precedents. In like manner in 1927 the President of the Council ruled that a money bill could be rejected only, not amended. Nor can there be any real doubt that this is the true constitutional position. There is nothing to distinguish the case of the Bahamas from those of New Zealand and Queensland, and the views of the law officers in the first case and of the Privy Council in the second are definitely unfavourable to the idea that the Council may amend money bills.[2] The evidence of practice seems conclusively against the claim now made. Moreover it is clear that on the merits the Council has no case. The members are nominated and it is manifestly proper that it should rest with the chosen representatives of the people to decide what taxes should be raised and what sums expended.

[1] Keith, *Constitutional History of the First British Empire*, pp. 207–12, 232.

[2] Keith, *Responsible Government in the Dominions* (ed. 2), i, 447–9.

NOTES.

Sir Frederick Pollock.—The death of Sir Frederick Pollock, of which we learn as we go to press, removes from us a man whose name to the present generation is that of a great master and a great teacher, and to posterity will most certainly endure so long as the Common law is studied and genuine scholarship is honoured. He was a great scholar and a great lawyer, and to these high qualities he added an extensive and delightful culture. The lofty ideals of learning and culture which he placed before the young lawyer were an inspiration to many of us his pupils, even though our halting steps may have stumbled where he firmly trod and we failed in our weakness to reach the elevation to which he summoned us. No name can be more honoured than his among his professional contemporaries. F. M. G.

The Spanish Civil War.—The following are the more interesting legal issues raised:

The Non-intervention "Agreement."—This so-called "agreement" appears to consist of nothing more than unilateral declarations by various governments as to the extent to which they propose to maintain impartiality. As there is no formal treaty any obligations created by such declarations depend on the intention of such governments to assume a legally binding attitude. There is no evidence of any such intention; indeed, the whole tenor of the conversations which have taken place and the assuredly provisional character of the declarations themselves indicate that they are mere definitions of policy liable to change at any moment. Moreover, an impartial attitude is already enjoined by international law, independently of such declarations, although in some respects they go beyond what is legally obligatory. Thus the customary law of nations already forbids the active support of a rebel force against a government internationally competent. For this purpose a government must be held to be internationally competent if it has been habitually treated as such by other governments up to the outbreak of civil war and has not been completely demolished. The fact that there may be constitutional doubts as to its legality does not affect its international status. Again, although mere sympathy with either side in a civil war is not forbidden, whether such sympathy is expressed by a government or by its nationals, yet a government is internationally delinquent if it fails to use "due diligence" to prevent the organization on its territory of an armed expedition against an internationally competent government. Finally, a government is not bound to prevent the private export of arms, food or provisions to the rebels, but it is clear that if a government itself renders such support (though its motives may be charitable) its action amounts to such intervention as to constitute an attack on the authority of the lawful government, respect for which is required by international law. Yet a government is not bound to prevent the enlistment of volunteers on its territory to aid the rebels provided these depart individually and not as an organized military force. On the other hand, the support of a competent government by the export of arms or making of loans or even by armed force is perfectly legal, for it merely involves the support of an authority recognized by international law. The Spanish government at Madrid and Valencia does not appear to have been destroyed, although it is *de facto* ineffective over a large part of Spain. Consequently an undertaking not to aid it is a promise not to exercise a legal competence ; a promise not to aid the rebels is an undertaking to respect existing obligations. Both these undertakings are of merely political, not juridical, value. The whole situation in Spain is governed by the law of peace, as no government has accorded the Franco party belligerent rights.

Freedom of the Seas.—The law of war and neutrality does not apply. Therefore neither side has the right of search on the high seas, blockade or of declaring " war zones " so far as these rights exist under the laws of war. Outside territorial waters government cruisers have a limited right of search and seizure governed by the rules of self-defence, but their powers are preventive and do not extend to the confiscation of either ships or cargo unless the vessel seized is engaged on unauthorized hostilities (piracy). Insurgent vessels must be regarded as pirates in respect of acts of violence committed on the high seas. Inside territorial waters the Spanish government has complete rights of jurisdiction, and foreign vessels enter such waters at their own risk while the civil war is raging. But where the rebels are in possession of a port the government cannot close it by decree and has no jurisdiction to prevent trade with such ports.

International Zone of Tangier.—The fundamental Act is the Statute of the Tangier Zone, 1923, to which France, the United Kingdom and Spain are parties. Art. 3 declares that the Zone is placed under a regime of permanent neutrality and that " no act of hostility on land or sea shall be committed in or against the Zone or within its boundaries." Further, " no military establishment, no base of operations, etc., shall be created or maintained in the Zone." The Statute reserves certain administrative duties to the diplomatic corps at Tangier which are specified in the general Act of Algeciras, 1906. By Art. 10 any agitation, propaganda or conspiracy in the Tangier Zone against the French or Spanish zone of Morocco is forbidden. The Committee of Control consists of the consuls de carrière of the signatory powers of the Act of Algeciras. On July 24, 1936, the Committee of Control decided in favour of complete neutrality in the Tangier, and on July 29 set up a Commission of Control over the port of Tangier composed of the commanders of warships of the Powers represented. On July 30 the French government objected that as the Sultan of Morocco had not delegated his powers in diplomatic affairs to the Committee of Control the interpretation of rights and obligations concerning the neutrality of the Tangier fell outside its competence and should be dealt with by the Resident General in Morocco acting as Minister for Foreign Affairs for the Sherifan government. On August 9 Spanish government ships were ordered to leave Tangier.

J. M. J.

Marriages with Hindus.—A dubious point in Scots law due to the unfortunate fact that *Lendrum* v. *Chakravarti* [1] was formally reported is cleared up by the considered judgment of Lord Jamieson in the Court of Session on December 11, in the claim brought by A. I. MacDougal against A. S. R. Chitnavis for declaration of nullity of marriage. The spouses were married by declaration before witnesses duly registered by warrant of the Sheriff in 1927, and only proceeded to India in September 1929. The wife, finding the conditions of life in the household of her husband's parents unattractive, returned to Scotland in 1932. Lord Jamieson found no difficulty, though the cause was undefended, in ruling that he had jurisdiction, the marriage having been contracted in Scotland, and that an incapacity resting solely on the religion of the husband as opposed to the general law of his domicil was not in Scotland a valid impediment to marriage,[2] agreeing in these matters with the earlier decision. But he declined to accept the argument that there was no *consensus in idem*, and no real consent constituting marriage, as the girl's only consent was to a marriage which would confer on her the status of a lawful wife and the pretended marriage did not do so. Lord Jamieson pointed out that consent to marry must be absolute, not conditional, and the validity of a contract could not be measured by such a fortuitous circumstance as the determination to live in any particular country. Any other doctrine seems quite untenable and certain to produce absolute confusion. The result of such marriages is unquestionably to produce hard cases, but the remedy for them is to be provided by legislation, not by judicial relaxation, on grounds of charity, of essential principles.

A. B. K.

English Law in Palestine.—In allowing an appeal from the Supreme Court of Palestine the Judicial Committee of the Privy Council made some important statements in regard to the scope and effect of the provisions of Art. 46 Palestine Order in Council (*Faruji* v. *Aiyub*, Privy Council Appeal 1/35). In delivering the judgment Lord Atkin said: "Their Lordships think there can be no doubt that the provisions of the Order in Council do enrich the jurisdiction of the courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in Common law and equity and also enrich their jurisdiction with the principles of equity, among other things, the well-established distinction between a penalty and liquidated damages."

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[1] See 1929 Sc. L.T. 96; Keith, *Letters on Imperial Relations, etc.*, 1916–35, pp. 339, 340.

[2] Cf. Dicey and Keith, *Conflict of Laws* (ed. 5), pp. 755–6.

The Senior Puisne Judge delivered a judgment in *Hammad* v. *Mgr. Louis Barlassina, Latin Patriarch, Jerusalem* (La 1/36), in which the learned judge referred repeatedly to Lord Atkin's judgment quoted above. Special reference was made to the dictum " that the provisions of the Order in Council do enrich the jurisdiction of the courts in Palestine . . . with the principles of equity." The Senior Puisne Judge pointed out that certain of these principles " may be invoked by the respondent, viz. ' Equity looks on that as done which ought to be done ; ' and ' Equity does not allow a statute to be made an instrument of fraud.' There are also the well-known maxims, applicable both in equity and common law, *ex turpi causa actio non oritur* and *in pari delicto melior est conditio possidentis*. There is nothing in the circumstances of Palestine or its inhabitants to hinder the application of these principles or to render them subject to qualification in the present case."

The learned judge sums the case up as follows : " There was a valid agreement for the sale of land by the appellant to the respondent. The respondent paid the purchase money, he was let into possession and at the time of action brought had been in possession for five years. Owing to the default of the appellant's agent, certain provisions of the law were not complied with, with the result that in law the appellant still remains the owner of the land. If the respondent is to be dispossessed now it is clear that damages will not afford an adequate remedy. There has been no default on the part of the respondent. He has thus an equitable right to the land and is entitled to sue for specific performance, and this is not affected by any of the penalty clauses in the agreement. Against any claim for the land by the appellant, the respondent has a good defence in equity."

This judgment indicates a definite change of attitude in regard to the interpretation of Art. 46.

Reference may also be made to the judgment of the District Court, Jerusalem, sitting as a Court of Appeal in Criminal Appeal (69/36). In this case the chief magistrate acquitted the respondent of the charge of manslaughter and after hearing argument of counsel for the appellant and respondent, relying on earlier judgments, dismissed the civil claim of appellant on the ground that such claim is dependent on the conviction of the wrongdoer.

The District Court held : " S. 6 (2) of the Jurisdiction of Civil and Religious Courts Ordinance, 1925, clearly stipulates that a Criminal Court is not bound, in awarding compensation, by the rules of Sharia law regarding diyet. This being the case, civil liability for compensation must be determined, therefore, in accordance with the ordinary rules of civil law. The Ottoman civil law does not deal with civil liability for injuries to the person, as this appears to be a matter purely for the Sharia law, and in accordance with s. 46 of the Palestine Order in Council, we have therefore to refer to the principles of the English common law governing injuries to the person caused by negligence."

R. GOTTSCHALK.

History of American Law.—At the last session of the Assembly of the American Bar Association Sir Maurice Amos appealed to American lawyers to produce a history of American law.[1] When reading modern American law books and cases the English lawyer feels himself at home, in a world of familiar modernity; he breathes, indeed, the atmosphere of the Common law, but of the developed Common law of to-day. Yet, since 1787, American law and English law have developed under different authorities. How has it come about that the development of each has been so strikingly alike in result, and what are the limits of this alikeness? Such is the gist of the question which Sir Maurice Amos opportunely raises. There exist many books detailing the process by which the cis-Atlantic law of 1787 has been transformed into that of 1937. Is it not time that American scholars revealed the stages of the trans-Atlantic transformation?

Civil Procedure in France.—The April–June number of the *Bulletin de la Société de Législation Comparée* for 1936 contains an article by M. Arminjon bearing on the Décret-loi of October 30, 1935, with reference to which we published a brief contribution by Maître Denoyer in our last issue.[2]

Maître Denoyer in his contribution emphasized particularly the modifications effected in the procedure relating to judgments by default, as to which reform has certainly long been overdue. In this respect, as in others, neither Maître Denoyer nor M. Arminjon appears to consider the modifications, though welcome, sufficiently drastic to combat the main defects of the existing procedure.

The wide knowledge possessed by M. Arminjon enables him to make comparison of the French with other systems of civil procedure. He concerns himself particularly with the advantages to be obtained by sorting out the claims presented to the courts so as to secure that the defence may not be allowed to prolong process to its own advantage when no real answer to the claim exists, or, if such answer does exist, it is such as can be effectively dealt with in a more summary way than by a full-dress trial. Something, but not much, is accomplished in this direction by the Décret-loi of 1935.

The existing procedure is severely handled by M. Arminjon. "*Le prétoire*," he says, "*est un terrain de combat où le plus habile et le moins scrupuleux remportent trop souvent la victoire.*" No system of procedure yet devised is proof against chicanery and finesse, but, it is argued, these evils are increased by the habit of leaving the direction of the process mainly in the hands of the parties and their advocates. The judicial office should be more clearly conceived as including not only the final decision of the issue, but also the control and direction of the process leading up to the presentation of the issue to the court.

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[1] Published in *American Bar Association Journal*, vol. xxii (1936), pp. 757 ff.

[2] *Journ. Comp. Leg.*, Third Series, vol. xviii, pt. iv, pp. 236 ff.

The point was put very strikingly in an essay by Signor Piola Caselli, published many years since in *L'Egypte Contemporaine*, to which M. Arminjon also refers. Speaking of Continental procedure in general, Signor Caselli remarks : "*On immobilise partant ce magistrat dans son siège et l'on place autour de lui un cordon sanitaire de dispositions procédurales qui lui empêcheront tout mouvement d'initiative et d'investigation. Il doit attendre que les représentants des parties développent par devant lui la procédure sans qu'il puisse ni la diriger, ni la corriger, ni la compléter. Il doit se contenter de se prononcer sur les faits tels que les parties ont su, ont pu et ont voulu les lui presenter* (*da mihi factum, dabo tibi jus*)." [1]

M. Arminjon, in his search for remedies, discusses, as had Signor Caselli before him, the methods adopted by the Austrian laws of 1895–7 to secure a proper sorting out of claims and the elimination of or summary decision upon those susceptible of such treatment, as also the procedure designed for the same purpose under our own Orders of Court. He refers also to that set forth in the *Dahir marocain sur la procédure* of 1912. Members of the Society of Public Teachers of Law will recall the entertaining and instructed lecture on the same subject given by Sir Maurice Amos at the 1932 meeting.[2]

Constitutional Conventions.—Dr. Jennings has favoured us with the following note :

" In his review [3] of Mr. Justice Evatt's *The King and his Dominion Governors*, Professor Keith attacks the author's views on the sanctions of constitutional conventions by reference to " the unfortunate mistake of thinking that the House of Commons ordinarily does not meet between July and April." Undoubtedly there is a mistake, but it does not vitiate the argument ; and as it arises from a misreading of a passage in a book of mine, perhaps I may be allowed to put Mr. Justice Evatt's point. Dicey's theory, so far as relevant for present purposes, is that if the Government does not resign when it has lost the confidence of the House of Commons, that House can (*a*) refuse to pass the Army and Air Force (Annual) Bill, (*b*) refuse to appropriate supplies and (*c*) refuse to renew annual taxation. My answer to this argument is that, even if it were true for other reasons that the law sanctions constitutional conventions, these remedies are not available between July and April : for (*a*) the Army and Air Force (Annual) Bill is passed in March and is in force until the following April; (*b*) the Appropriation Bill is passed in July and is in force until the following April; and (*c*) the Finance Bill is passed in July and is in force until the following April. This is, of course, a minor argument, and there are many other reasons for thinking that Dicey's theory is false."

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[1] "*De la rapidité de la justice civile en Autriche.*" *L'Egypte Contemp.*, 1913, at p. 56.

[2] Published in the *Journal* of the Society, 1932, pp. 12 ff.

[3] *Journ. Comp. Leg.*, Third Series, vol. xviii, pt. iv, p. 309.

Annales de l'Institut de Droit Comparé de l'Université de Paris.[1]—Volume I of the *Annales* was noted in the issue of this *Journal* for February 1935. The present volume opens with an interesting article by Professor P. Sholten on the inadequacy of the traditional doctrine that interpretation is merely an attempt to discover the intention or "will" of the legislator. His conclusion is that all interpretation ultimately involves the intuitional judgment of the judge. (*L'interprétation de la loi et la justice.*) The next article, by Professor Kelsen (*Droit et état du point de vue d'une théorie pure*), is a restatement of his theory of the unity of the legal order with special reference to the notions of juridical obligation, the Constitution of the State, law and the State, and the State and international law. He admits the "ideological" value of traditional doctrine on these points, but maintains that there is a "dualism" inherent in it (objective law and subjective right, law and the State, international law and municipal law) which arises from a desire to "justify" or legitimize the State. Such a justification is, in his opinion, foreign to the purpose of juridical theory, and the "dualism" is unnecessary. Professor Salvatore Galgano gives an interesting account of the work of the Italian Institute of Legislative Studies and of foreign collaboration in the work. Professor Mirkine-Guetzévich, under the title *L'histoire constitutionelle comparée,* defends the comparative study of constitution from an historical point of view, and urges the necessity of studying the history of constitutional practice rather than of constitutional doctrine. Professor Beuve-Méry contributes a study on *Les nouvelles tendances du droit public tchécoslovaque,* which is of special interest to students of the English liberal tradition. Writing in March 1934 he discusses the law of 1933 on the dissolution of political parties (not now in force), the laws restricting individual liberty, freedom of association and of the Press, the law of 1933 on municipal elections, which he describes as "authoritarian in tendency," and the laws conferring "extraordinary powers" over the economic system. Next we have a study by M. André Toledano entitled *L'évolution constitutionelle hongroise,* which deserves attention from students of English constitutional law, for, as the writer observes, the Hungarian Constitution may be profitably compared with that of Great Britain. He outlines its development from the year 1000 to the present day, mentioning the interesting doctrine of "la sainte couronne," and concluding that "the country has a parliamentary and representative government with aristocratic and corporative tendencies." Professor Vichniac writes on *La représentation dans les régimes démocratique, corporatif et soviétique* and says that "historically the Soviets precede democracy, and the trend of evolution is from Soviets to democracy and not the converse." The Soviet Constitution of 1936 gives Professor Vichniac's comparative study a special interest. Professor Sholten in his *L'influence du droit civil français sur le droit civil hollandais* indicates the extent to which the French Civil Code and contemporary French doctrine have been and continue to be influences on Dutch law. Professor Sugiyama describes foreign influences on the law of Japan, referring to the influence of France in the sphere of private law, that of Germany on Japanese public law and institutions and a " secondary " influence of Anglo-Saxon law in the sphere of company law and contract. M. Marthe Depitre writes a complimentary note on Dr. Radcliffe's book on English real property law. Professor Maggiore examines the modern penal law of Italy in the light of contemporary criminological theory. He compares the Italian Penal Codes of 1889 and 1930, describing the changes made in the 1930 Code and by the law of 1931 abolishing the jury (*La nouvelle législation pénale italienne*). M. Ancel brings the volume to a close with a brilliant comparative study of the rule " nulla poena sine lege " in modern positive law. He contends that the repudiation of the rule results from a " revolutionary ideology." M. Ancel's article should be read with the Advisory Opinion of the Permanent Court in the matter of the Danzig Decree-Laws.

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[1] Vol. ii, pp. 272 (Paris, 1936).

J. Mervyn Jones.

Columbia Law Review.[1]—The issue for June 1935 contains an article by Dr. Felix Cohen on " Transcendental Nonsense and the Functional Approach," which merits special attention. Alike in the political, religious, social and legal spheres has the treatment of fictions, metaphors and concepts as though they were real things been in every generation a fruitful source of error. " Our legal system," says Dr. Cohen, " is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience. . . . Against these unverifiable concepts modern jurisprudence presents an ultimatum." And against these concepts Dr. Cohen launches an extremely effective attack which is good reading and good sense. Mr. Boudin in the same number discusses the fate of the Writ of Habeas Corpus in the New York courts, more particularly in connexion with the case of John Aquino in 1933. His conclusion is that while in England the Writ is being constantly strengthened, in New York its efficacy has been so curtailed as to raise a doubt whether there is anything left of it.

Professor Handler's article on " The Sugar Institute Case " [2] contains an extremely interesting summary of the present attitude of the American courts towards " restraint of trade " and some comparison with the English view. The subject is one of present interest as is manifest from contributions in our own current number.

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[1] Vols. xxxv (June–Dec.), xxxvi (Jan.–May).

[2] Col. L.R. xxxvi, pp. 1 ff.

The Restatements are badly mauled. Dr. Cohen describes them as "the last long-drawn-out gasp of a dying tradition." "The more intelligent of our younger law teachers and students," says he, "are not interested in 'restating' the dogmas of legal theology." [1] Professor Yntema attacks the Conflict of Laws Restatement from a somewhat different point of view. The conditions of its genesis were not such as to vouch for its authority—nor is it, in fact, an accurate formulation of the existing law.[2]

Mr. Knauth examines [3] the Draft Convention as to Aircraft Salvage drawn up by the C.I.T.E.J.A.[4] and discusses the whole question of salvage principles in relation to aircraft and with special reference to their application to aircraft on or over land.

In his article on Wrongful Death in Admiralty and the Conflict of Laws,[5] Professor Robinson (Cornell) discusses the difficult questions which arise when a tort is partly committed in one jurisdiction and partly in another. What he says is well worth perusal, but his opening quotation is debatable. It is surely not a "singular" fact [6] that a man has no private remedy for the taking of his life. So far from being "singular," it is the most obvious inference from the fact of death. Compensation to a dead man for "being killed" is absurd.

Palmam qui meruit ferat. An article in the review which will give great satisfaction to British lawyers is that of Mr. Shientag, a Justice of the Supreme Court of New York, entitled "A Modern Judicial Mind." [7] It concerns the writings of our noble and learned chairman. Mr. Shientag's valuation is high and his admiration generous. And we can happily join in the chorus.

The reviews of books, particularly of English books, are of special interest. Dr. Cohen's review [8] of Dr. Robson's *Civilisation and the Growth of Law* is mild in its appreciation. He considers it "only fair to say that the book does represent an advance towards modernity in English legal thinking. "The Robson brew may," he remarks, "be pleasanter to take than the Austinian, but the Austinian leaves a clearer head in the morning." And with this reflection we are inclined to agree.

Professor Baldwin is critical of the new edition of Anson's *The Crown.*[9] The fact is that classical works such as this which, in the author's own editions, bear so markedly the impress of the writer's personal outlook and his period do not easily tolerate the process of being brought up to date. Dr. Jenks's remarks in our issue for February 1936 support this view.

Surely at the University of Pennsylvania the fact that so distinguished a writer as Professor Lévy Ullmann publishes in his native tongue should be known. But it is not so. The reviewer of *The English Legal Tradition*[1] surmises that the volume has appeared only in the translation and that all the editor had to do was to add a few notes. The editor can assure the learned reviewer that his burden was not so light. The review itself is appreciative with reservations, and the reservations and criticisms are interesting and instructive.

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[1] Col. L.R. xxxv, p. 833. [2] Col. L.R xxxvi, pp. 183 ff. [3] *Ibid.*, p. 224.

[4] Printed in *Journ. Comp. Leg.*, Third Series, vol. xvii, pt. i, pp. 102–5.

[5] Col. L.R. xxxvi, pp. 406 ff. [6] *Loc. cit.*, p. 406.

[7] Col. L.R. xxxvi, pp. 615 ff. [8] *Ibid.*, pp. 861 ff. [9] *Ibid.*, pp. 171 ff.

F. M. G.

L'Egypte Contemporaine.[2]—In our day tendency in Moslem countries has favoured the supersession of Islamic ideas of law and government by those of Europe. Against this policy the modernist movement in Islam has always protested, and this protest was earnestly voiced by its eminent pioneer, Mohammed Abduh. He, indeed, was strictly a religious rather than a legal reformer, but, in Islam, religion and law are so intertwined that to touch one is to affect the other. Free adaptation upon basic Moslem principles was the method which he advocated. And as judge in the Native Courts and afterwards as Grand Mufti, he is said to have shown striking independence in interpretation and even of the law itself. As Mufti he seems to have claimed the right of *ijtihad* (independent opinion) long since disused, and its accepted exercise would indeed make practicable the adaptation of Moslem law to modern conditions. As it is, however, no Moslem country has yet made a serious effort in this direction, but to such an effort the Egyptian Government is invoked by Sheikh Mohammed Soliman, Vice-President of the Egyptian Moslem Courts, in an interesting article contributed to *L'Egypte Contemporaine.*[3] The government proposes to attempt a unification of the Egyptian law, and two commissions have been established to prepare respectively a new civil and penal code. Is it not fitting, asks the learned Vice-President, that Egypt—a Moslem country—should have a Moslem civil law? That Moslem law is flexible enough to adapt itself to new conditions he asserts and seeks to prove by quotation and illustration.

Another article of legal interest is that of M. de Wée[4] in which the suggested abolition of the Mixed Courts of Egypt is countered by a suggestion to create Mixed Courts in Europe. The uncertainties and delays to which the present situation gives rise in commercial disputes between merchants of different countries would, it is argued, be thereby avoided. The precedent of the Mixed Arbitral Tribunals is a fair one. Nor can the suggestion be considered purely academic. The establishment of a Mixed Court as between France and Belgium has been seriously considered and the objections which prevented its achievement are met by M. de Wée with arguments of considerable force.

F. M. G.

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[1] Col. L.R. xxxvi, pp. 690 ff.

[2] *Revue de la Société royale*, Nos. 157–65 (1935–6).

[3] No. 163, pp. 271 ff., *Mise en harmonie de la nouvelle législation égypt. avec le concept de la loi musulmane.*

[4] No. 160, pp. 1 ff., *Projet de création de Tribunaux Mixtes en Europe.*

Encyclopædia of Modern Civil and Commercial Laws.[1]—This important work—an almost indispensable tool for the student of comparative law, so far as modern laws are concerned—is steadily marching on. The last article on *Schuldenhaftung des Erben*, *i.e.* the liability of an heir for debts, indicates the point in the alphabet which the work has now reached.

Its method is an excellent one. It does not content itself with giving side by side the laws of various countries as to a particular matter. The laws are really *compared*. The work is done by an army of contributors in different countries, each article is signed and at the end of each article is a full bibliography. This of itself makes the work immensely useful to the student of foreign laws, whether his purpose is practical or academic.

F. P. W.

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[1] *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*. Edited by Dr. Franz Schlegelberger. Vol. v., parts 7-10; vol. vi, parts 1-3. (Berlin: Franz Vahlen.)

NOTICES OF BOOKS.

FRANKENSTEIN'S SYSTEM OF PRIVATE INTERNATIONAL LAW.

For a long time the cultivation of Private International Law has been pursued with by far the greatest intensity and success in Latin countries. German legal literature in pre-war times could offer only a comparatively modest contribution. The mere theoretician could find many valuable suggestions, mainly in the well-known works of v. Bar and Zitelmann, but for the practitioner there were only textbooks and commentaries of a decidedly mediocre and antiquated character. The years from 1920 to 1933 have witnessed a complete change in this situation. Although the German literature can by no means claim to have already attained equality with the admirable French literature on the Conflict of Laws, more textbooks and monographs of high standing have been published in Germany than even the most optimistic observer could have anticipated. Raape's commentary,[1] a work of profound research, M. Wolff's excellent textbook for students,[2] Nussbaum's handbook,[3] admirably adapted to the needs of the practitioner, Lewald's brilliant outlines,[4] Melchior's treatise [5] on the principles of Conflict of Laws, Neumeyer's compendium [6] on the Conflict of Administrative Laws, a rich mine of information, and last but not least, Gutzwiller's very fine short treatise [7]—to mention just those works which embrace the whole field in its entirety—are all works which deserve and fully repay study, and which ought to be consulted wherever and whenever the views of modern Continental lawyers have to be ascertained.

It is not meant as a diminution of the merits of these contemporary writers if it is said that Dr. Frankenstein's voluminous work on Private

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[1] Vol. vi, pt. 2 of Staudinger's *Kommentar zum Bürgerlichen Gesetzbuch*, 9th edition, 1931.

[2] *Internationales Privatrecht*, 1933 (part of Kohlrausch and Peters, *Enzyklopädie der Recht- und Staatswissenschaften*).

[3] *Deutsches internationales Privatrecht, unter besonderer Berücksichtigung des österreichischen und schweizerischen Rechts*, 1932.

[4] *Das deutsche internationale Privatrecht auf Grundiage* (*sic !*) *der Rechtsprechung* 1930 and 1931.

[5] *Die Grundlagen des deutschen internationalen Privatrechts*, 1932.

[6] *Internationales Verwaltungsrecht*, vol. i, 1910, vol. ii, 1922, vol. iii, 1934, vol. iv, 1936.

[7] Part of Stammler's *Das gesamte deutsche Recht*, vol. i, pp. 1521–1664.

International Law [1] is outstanding even among the series of their books. It deserves to be called outstanding not because it is so much superior in value and wealth of material, though it is not lacking in this respect and deserves high praise for the inclusion of a good many questions which have nowhere else found adequate discussion, but because it is different from them in its aims and its character. As to each of these a few words of explanation will not seem superfluous.

Harrison,[2] speaking of English lawyers, says: "We do not seek for higher generalizations from which the rules of law can be deduced. We content ourselves with classifying and stating the rules of law as they are developed in practice . . . the recent Germans incline towards our more practical view." This tendency in German legal literature observed here in an essay, first published as early as in 1879, has grown much stronger in recent years. It prevails especially in German textbooks and monographs published since 1920. Nearly all of them aspire to do no more than classify and state the rules as developed by the courts,[3] only occasionally criticizing judgments as being out of conformity with the written law of former judgments or as opposed to practical needs. Frankenstein's is the only modern work in the German language which proclaims the insufficiency of such "positivistic" methods and aims at finding "higher generalizations" which are claimed as a means of testing the value of the rules contained in the various national laws relating to the problem of Conflict of Laws, as the only scientific way of classifying these rules and—more important perhaps—as *ultimum refugium* where no such rules, foreign or national, as the case may be, can be ascertained.

English lawyers, especially those who are acquainted with Harrison's severe criticism of that school of thought which has been styled by Professor Beale [4] the "internationalistic school," will probably be inclined to think very little of such attempts. Even Continental reviewers, though with due acknowledgment to Dr. Frankenstein's profound learning and to his immense study, testified by a richness of material not reached by any other German treatise, have not hesitated to censure him for having introduced into German literature a type of work which seemed to have come to an end with Zitelmann's famous work. A closer view of the actual state of Continental private international law and its science will, however, it is submitted, reveal that there is at least something to be said in favour of attempts like Dr. Frankenstein's—even from a point of view which, like the present writer's, claims to be decidedly "positivistic."

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[1] *Internationales Privatrecht* (*Grenzrecht*), vol. i, 1926; vol. ii, 1929; vol. iii, 1934; vol. iv, 1935. (Berlin-Grünewald-Forst; Verlag für Staatswissenschaften und Geschichte G.m.b.H.)

The lectures, delivered by Dr. Frankenstein in 1931 before the Hague Académie de droit international (*Tendances nouvelles du droit international privé*) form a very important supplement to the first volume of the main work, as they contain some corrections of Dr. Frankenstein's theory as set out in vol. i. These corrections have, of course, been taken into consideration in the above statement of his views.

[2] *Jurisprudence and the Conflict of Laws*, 1919, p. 142.

[3] This is especially true with respect to the works of Professor Lewald and Dr. Melchior.

[4] Readers should, however, be warned not to identify Dr. Frankenstein with this school too closely.

In Continental laws judicial decisions have no binding force. They do not as a rule form an authority from which judges can infer the law. The judge who decides a case has in the first instance to take the authority on which to rely for his decision from his code. He need not take it from the words of the code, he can take it from its spirit, *i.e.* he may, from the way in which the code has decided one case or one group of cases, infer the way in which the legislator would have decided a similar case or a group of similar cases or even different cases. To expound the spirit of the law and thereby to pave the way for the judicial practice is regarded as the task which the science of law has to serve. This system, with its mutual influence on theory and practice, much easier to observe than to describe, works well, as everybody knows, in all branches of municipal law. It has, however, met with peculiar difficulties in the sphere of private international law. Foremost among these difficulties stands the unsatisfactory state of codified laws in most Continental countries. With few exceptions, such as Poland and Liechtenstein, the provisions relating to the conflict of laws in Continental codes are few in number and leave an exceptionally broad field completely uncovered. The German code, for instance, with the only exception of one rule relating to form, does not contain any provisions on so important a branch of law as the Law of Contracts. To cover so large a field by logical or teleological inferences from some scanty rules designed for quite different questions seems to be a somewhat arduous, if not an impossible, task. It does not become much easier by even a very wide and benevolent inclusion of all sorts of rules within the bounds of "customary law," when, as is the case at the present time, numerous fresh and puzzling questions come before courts and, perhaps oftener still, before counsel entrusted with the drafting of international agreements. The difficulty increases where, as in Germany, the few inadequate provisions which are to be found in the code are the result of compromises and, as an inevitable result, not devoid of inherent contradictions as to the basic principles underlying them. It is a problem how to draw inferences from the spirit of a law where the question whether such spirit exists at all seems rather difficult to answer.

It is not surprising that, as an outcome of this unfortunate situation, a spirit of modesty and resignation has begun to invade contemporary legal literature on Conflict of Laws, quite unknown to other branches of Continental legal science. No less eminent a jurist than Professor Bartin has said that to him the problem of "qualification" seemed to be insoluble.[1] Still more astonishing seems the definite tendency on the side of legal science to abdicate in favour of judicial precedents, a tendency which Professor Martin Wolff, with his usual brilliancy, has indicated by saying that "Story has become the secret teacher of the world."[2]

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[1] Clunet, 1897, pp. 225 sq.

[2] *Loc. cit.*, p. 132.

It is little to be wondered at that a counter-movement should have started. If legal science is to be a pioneer for legal practice, such counter-movement seems praiseworthy whether or not its start has been entirely successful.[1] It is from this point of view that, in my opinion, Dr. Frankenstein can claim considerable merit. His opinions, I venture to submit, are liable to find strong opposition, and to a great extent, at least, do not seem to be convincing. But as an achievement of scientific thinking there are few modern works on the Conflict of Laws which claim more interest, more respect and even more admiration.

In Dr. Frankenstein's view it is the nature of law itself from which, by certain philosophical conclusions, the basic principles of private international law can be inferred. To put it shortly, the result is this:[2] the sovereignty of each State is not unlimited. Sovereignty is a legal institution which binds only internally, *i.e.* the State's own subjects and its own courts. Internationally the legal power of each State to order legal relation by legislation is kept within limits which, as they are derived from the nature of law itself, can claim to be observed as law by such courts which are not bound by the State's own legislation. There are two rules which define the extent of each State's power to legislate. The first is called the rule of sovereignty over persons (*Personalhoheit*): it lays down that every State has legal power to regulate all legal relations of all its subjects, wherever they may reside or be domiciled. The other rule is called the rule of sovereignty over territory (*Territorialhoheit*): every State has absolute authority within its own boundaries. From this it follows—according to Dr. Frankenstein—that every State can regulate the legal relations of all things moveable and immoveable and all monopolies which exist or are to be used within its territory. Furthermore, it follows that the principle of sovereignty over territory excludes the application of the other rule, provided that the application of the latter rule would result in contradicting the provisions of public law of the State whose courts are called upon to decide. This is the aprioristic basis on which Dr. Frankenstein's system rests.

The actual, *i.e.* positive law, is combined with this philosophical background in the following manner: if it has been ascertained that *a priori* a State (State A) is competent to legislate upon a question, *e.g.* to determine how X, one of its subjects, residing in State B, should make his will, its competency can be used in either of two different ways. State A may rule that the person in question should make his will in accordance with the domestic law of State A, or it may allow or order him to make it in accordance with the law of State B. The latter possibility is styled "*sekundäre Anknüpfung*" by Dr. Frankenstein. It is unnecessary to observe that the "*sekundäre Anknüpfung*" covers those problems which jurists all over the world have attempted to solve by the doctrine of Renvoi.

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[1] Even while these lines are being written another such attempt is about to be made. Dr. E. Isay, in his article "Le droit International privé au delà des Etats," in *Révue internationale de la théorie du droit*, vol. x, pp. 39 sq. (1936), outlines the elements of a new system of private international law, which he has already finished and which will probably soon be published.

[2] To outline the very interesting arguments by which this result is deduced is impossible in the space at my disposal. I must refer the reader to Dr. Frankenstein's first volume, and to his Hague lectures, see above, p. 133, n. 1.

It may happen sometimes that a State presumes to legislate for itself upon a question for which it is not *a priori* competent, *i.e.* according to the rules just mentioned derived from the nature of law itself. This happens frequently in England: English law subjects everybody domiciled in this country to English law as regards a great number of legal relations, although he is not a British subject, nor is the legal relation itself of that kind which according to the rule of sovereignty over persons would be subjected to English law. This assumption of power in contravention to the basic aprioristic principles is by Dr. Frankenstein called a "*Pseudoanknüpfung.*" In view of the overwhelming importance which Dr. Frankenstein attaches to his *a priori* rules, it can scarcely be surprising that he is inclined to deal rather harshly with such obstinate laws. Although he does not deny that English judges and English courts are bound to follow them, he thinks that internationally they are no law at all, and he styles them quite bluntly arbitrariness and even "violence."[1]

The main question, especially for an English reader, will, of course, be how Dr. Frankenstein's theory works in practice and where practically the essential differences lie between his system and that used by the dominant opinion. This is best shown by a comparison of the two ways of handling an actual problem. Let us assume that a judge has to decide the question which law governs a certain contract of sale. In this case the dominant opinion will require the judge to look in the first instance to his own national law relating to the Conflict of Laws. Even at the beginning, therefore, the *lex fori* plays a decisive rôle. If the court is German, then, according to the dominant view in German private international law, that law applies which the parties desired should be applied. To this answer there is an irrefutable logical objection, which Professor Neumeyer[2] has thus stated: "What the parties agree upon is legally nothing, provided there is not already a proper law to the agreement from which the parties' agreement can derive its legal validity." That means in practice that the highly important question is left open how to determine the proper law which is called upon to decide whether the contract is invalid for any reason, either of form, content, formation (mistake, misrepresentation, fraud), capacity of the parties, etc. Furthermore, it is well known that very often the intention of the parties cannot be ascertained, because the question of the proper law has never for a moment entered their mind. According to the view taken by the German courts, the judge has in such a case to follow the *lex loci solutionis*. This, however, presents new obstacles. *Locus solutionis* is a technical term. It is an institution of positive law, insolubly connected with a definite system of domestic law. This means that in finding out what *lex solutionis* means and is, the judge has to apply law, and the German dominant view is forced *faute de mieux* to resort to their own law as the *lex fori* for the purpose of overcoming this difficulty. Dr. Frankenstein calls this " the bankruptcy of private international law," and even many who dislike strong words will agree with him in his view that this solution is not a satisfactory one.

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[1] Vol. i, p. 52.

[2] *Internationales Verwaltungsrecht*, vol. ii, p. 456.

Dr. Frankenstein's theory possesses one great advantage in comparison with the dominant opinion. It presents international lawyers all over the world with an identical starting-point on which to stand at the beginning of their reasoning: namely, the two *a priori* principles. As the obligation is a *vinculum iuris* which binds the person, the law of the debtor's nationality is in Dr. Frankenstein's view the law which governs the problem *a priori*. If under the agreement both parties are bound to do or forbear to do something, each party's obligations are governed *a priori* by the party's own law. This law may then refer to some other law, *e.g.* that of the *lex domicilii* or the *lex solutionis*, and such provision is, of course, to be respected. If the law, which is applicable *a priori*, does not contain a provision or such provision cannot be ascertained, then the judge will revert to the *a priori* rule. This rule, therefore, serves two purposes: it enables the judge to take a firm stand in cases of uncertainty and doubt, and—more important still—it provides a universally applicable substitute for the " *lex fori* " and so acts as *concordantia discordantium.*[1]

The importance which Dr. Frankenstein allots to the " *Pseudoanknüpfung* " is best illustrated with the help of a practical example. A marriage between two Italian subjects might be dissolved by a Prussian court before 1900, as Prussian law then contained a rule which made Prussian law applicable. This is in Dr. Frankenstein's view a " *Pseudoanknüpfung*," because *a priori* Italian law was applicable, which does not refer the question to Prussian law and does not permit a divorce between Italian subjects. From that it follows in Dr. Frankenstein's view that, although Prussian courts will, of course, recognize such a divorce, no foreign court is bound to do so. In France, *e.g.*, the marriage would, therefore, have to be considered as still subsisting.

It is, of course, impossible to follow Dr. Frankenstein here through all his ingenious arguments. To attempt this would mean to write a book not less compendious, perhaps, than one of his weighty volumes itself. But a few remarks may be allowed, which may indicate what seem to the present writer to be the main objections against Dr. Frankenstein's theory.[2]

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[1] Raape, *Staudinger's Commentary on the German Civil Code*, vol. v, 2 (1932), p. 61.

[2] For the following I am indebted to the following authors and reviewers, who all have dealt with Dr. Frankenstein's theory: Raape, *l.c.*, p. 60. Neumeyer, *Jurist. Wochenschrift*, 1926, pp. 1909 sq.; *Zeitschrift für ausländ. und intern. Privatrecht*, 1929, p. 327. Lewald, *Blätter für Intern. Privatrecht* (Appendix of *Leipziger Zeitschrift*), 1927, pp. 65 sq. E. Isay, *Zeitschrift für Völkerrecht*, 1928, p. 248; 1929, p. 523. Gutzwiller, *International Privatrecht*, p. 1532. Niemeyer, *Zeitschrift für inter-*

It is the basis and the starting-point which lay themselves open to criticism. To attempt to derive rules of positive law from philosophic principles is a mistake—a mistake, indeed, which to a certain extent could be called peculiarly attractive to German jurists. It has been committed by no less an authority than Rudolf Stammler, and Dr. Frankenstein, although he polemizes against him, does not avoid the same pitfall.[1] Legal methodology, of course, is on a different footing, and Dr. Frankenstein might, perhaps, object that his *a priori* rules only form a methodological system, because with the help of the "*sekundäre Anknüpfung*" they give way to the positive law. But I do not think that this is convincing: the fact that his *a priori* rules not only present a method to arrive at a solution in cases of gaps in the positive law but form a ready-made, universal solution for all such cases, the use he makes of his "*Pseudoanknüpfung*" and countless other instances are proof against this supposed defence.

There might be much to say as to the way by which the author has arrived at his basic *a priori* principles. I must leave this task to a legal philosopher.[2] I may, however, be permitted to say that Dr. Frankenstein's conception of "law" seems to be the main cause of the unsatisfactory character of his system. It does not distinguish with sufficient clarity between what the law is and what it ought to be. It is submitted that a peculiarity of the German language has misled the author—a fact which became clear when he had to develop his system in the French language and which to a certain extent seems then to have been admitted by him.[3] Anyhow, it scarcely seems wise to build up a system of law destined to serve practical purposes not upon historic research and teleological construction, both admittedly difficult and complex, but upon philosophic arguments as to problems, which for centuries have kept the most eminent brains all over the world busy and which have nevertheless not found a solution so convincing as to be acceptable to more than a few philosophical "schools."

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nationales Recht, 1927, p. 426. Satter, *Zeitschrift für öffentliches Recht*, 1928, p. 45. Lorenzen, *Yale Law Journal*, 1927, p. 1030; 1930, p. 921. Philonenko, *Journal de droit internat.* (*Clunet*), 1932, pp. 265 sq. Ghiron, *Rivista di diritto internazionale* (*Anzilotti*), vol. xiv (1935), p. 124; *Pacchioni di una recente dottrine di diritto internazionale private Riv. di dir. priv.*, 1931, p. 483. Ghiron, in his very elaborate review, quotes a number of other essays and reviews which have not been accessible to me. I do not, of course, identify myself with all the views of the aforementioned authors, *e.g.* not with Dr. Gutzwiller's criticism, which seems to be based on a misunderstanding of the meaning of Dr. Frankenstein's theory. The *Zeitschrift für öffentliches Recht*, vol. xv (1935), p. 152, contains a review by von der Heydte, which in my view does not further the discussion at all. Dr. Frankenstein has replied to some of his critics in *Jurist. Wochenschrift*, 1927, pp. 2257 sq., *Blätter für internationales Privatrecht*, 1927, pp. 121 sq., in his Hague Lectures and in vol. iv of his work, p. 637.

[1] Cf. Ginsberg in *Modern Theories of Law*, p. 46, whose objections to Stammler's critics do not, to my mind, seem convincing.

[2] This point has been dealt with by Professor Pacchioni, in *Rivista di diritto civile*, 1931, pp. 493 sq.

[3] Cf. *Tendances nouvelles*, p. 40.

Apart from that, Dr. Frankenstein's rule itself will scarcely appeal to any reader except one trained in a system based on the principle of nationality and likely to regard this system as the best possible in all cases.[1] English lawyers find that the principle of nationality does not answer the problem of British nationals living within the boundaries of the Empire and even within the United Kingdom, under many different laws but yet subject to one sovereign. They will note with satisfaction that in cases of stateless subjects and "*sujets mixtes*" even Dr. Frankenstein is forced to apply the law of "*Wohnsitz*," this being the German equivalent of "domicile." This is an admission, that the *a priori* rules, derived from the nature of law, do not cover just those cases which are of peculiar interest and importance to international lawyers. Continental lawyers, on the other hand, will remember that the principle of nationality was introduced into Continental laws less than about 100 years ago and will feel surprised that it suddenly should attain *a priori* splendour just at the very moment when in more than one country the pendulum is swinging to the other side. Europe is full of emigrants who desire nothing more intensely than to rid themselves of the unpleasant and sometimes unjust consequences of their nationality at the earliest opportunity.

It can scarcely be denied that if Dr. Frankenstein's theory is applied in practice, it will favour a rather old-fashioned sort of reasoning, which is either identical with the well-known "*Begriffsjurisprudenz*," against which Ihering once wrote his famous satiric letters, or at least looks suspiciously like it. His system of the law of conflicts, as far as obligations are concerned, rests upon the assumption that obligation means a personal tie on the part of the debtor,[2] from which it follows that the national law of the debtor governs claim and debt. This rule is with admirable consistency applied even to delicts.[3] That the law of the child's nationality governs the father's right to demand restitution from anyone who unlawfully detains the child is justified by the statement that the father has an absolute right (an "ethical mortgage") in the child's person, which legally stands on the same footing as an absolute right in a chattel.[4] Numerous similar examples could be added. The inner reason for the author's predilection for such arguments is that his *a priori* rules are too abstract and far-fetched, too few in number, too little based on practical considerations that their application in a given case could be possible except with the help of that old, complex, pseudological apparatus which formed the delight of former generations but appeals to few to-day.

But even this could, perhaps, be forgiven if Dr. Frankenstein's claims were justified that his theory solved that greatest crux of private international law, the problem of Renvoi. In Dr. Frankenstein's system the word "renvoi" finds no place. First come the *a priori* rules, then the law declared applicable by them, then the "*sekundäre Anknüpfung*," which may, perhaps, be found there—and no Renvoi is needed! This is too good to be true; we may, for example, ask as to what is the intention of, for example, the French law, if it, by a "*sekundäre Anknüpfung*," declares, let us say, Italian law to be the proper law to apply to a problem. Is it Italian law in its entirety, including the law of Conflict of Laws? Or is it only the substantive Italian law? Dr. Frankenstein decides for the first alternative, but his readers will not fail to see that by a back-door the old problem creeps in again and that no new remedies have been found for a better cure.[1]

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[1] It is significant that Dr. Isay's new system seems to be based on quite a different principle which comes rather near to the Anglo-Saxon doctrine of domicile. See above, p. 135, n. 1.

[2] Vol. ii, p. 178. See *Journ. Comp. Leg.*, vol. xvii, p. 284.

[3] *Loc cit.*, p. 362.

[4] Vol. iii, p. 5.

It is the pleasant side of a reviewer's task that, while he can and must point out where in his view the author has failed to solve his problems, he is not required to say how he himself would have done it. All the more is it fitting to say that scarcely ever has a more serious attempt been made to attack the problems of private international law from a non-positivistic standpoint and that, far from deserving blame, praise is due to the author who has produced a work which, apart from its meta-legal basis, is the most reliable handbook on the "positive" German law of Conflict of Laws. To the author this brings, perhaps, little comfort. But some readers will ask whether it is not a more admirable achievement to produce a profound and solid legal textbook than to add to the series of unsuccessful attempts to attack the tower of positive law with the unreliable help of philosophical ammunition. It remains to be seen whether Dr. Frankenstein's inspiring efforts will not have the effect of interesting other writers in that all too little cultivated field where alone a philosophical treatment is entirely indispensable: that of legal methodology as applied to the law of Conflict of Laws. There are few branches of the law where the great work of leading methodologists like Gény,[2] Ph. Heck and others has had, in practice as well as in theory, less influence than in that of Private International Law.

There seems to be little doubt that even the best methodology will not be able to simplify this complex branch of law to any appreciable degree. That obvious simplicity which cannot be denied to Dr. Frankenstein's system will perhaps never be attained by any "positivistic" author. But the complexity of Private International Law is not the result of theories or methods: it is the unavoidable consequence of circumstances beyond the sphere of law and legal theory, namely of the existence of too many sovereign States, each of them incessantly creating new rules of law, none of them recognizing any superior power. It may very well be said that a greater impulse for an improvement of this state of affairs comes from the intolerable complexity of the law and from the obvious inability of legal methods to cope with the resulting difficulties than from attempts, however interesting and ingenious, to cure an incurable system which, the sooner the better, will cede its place to an entirely new order of things.

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[1] See Professor Raape's remarks, *l.c.*, p. 61.

[2] See Wortley's essay in *Modern Theories of Law*.

ERNST J. COHN.

COMPARATIVE LAW AND PROFESSOR SARFATTI'S INTRODUCTION.[1]

PROFESSOR SARFATTI is to be congratulated on having produced in brief form a careful and scholarly general introduction.

His scheme is, first, to give an account of the early instances in which laws of different countries have been compared with each other for a practical purpose. He then discusses the nature and function of comparative law, and his third chapter gives a short history of the modern codes of Western Europe, of the codes of Japan and China—into which much Western law has been introduced—and of the Anglo-American Common law.

In the last twenty pages there is a discussion of the method of study, and a rather reserved declaration of faith in the final unification of the private laws of those countries whose legal systems are akin.

The notes indicate careful study of the extensive literature. Unfortunately for us, a good many of the Continental reviews referred to are found in few, if indeed in any, of our libraries.

Our current term " comparative law " is infelicitous, but too firmly established to be changed. *Droit comparé* is clearly better. Professor R. W. Lee, in his presidential address of 1936 to the Society of Public Teachers of Law, has indicated some of the obscurities which hang about the term " comparative law."

> If Comparative Law is a science, we must be informed as to its subject-matter, what the Germans call the *Problem-gebiet*. If it is a method of comparison, we must know what it is concerned to compare.

While admiring the wit and wisdom of Professor Lee's address, it seems to me that he is a little unkind in not explaining the attempts which have been made to clear up these obscurities. The term " comparative law " has been used, no doubt, in a very wide sense indeed. Kohler says it includes universal legal history, and its scope is to explore the laws of all peoples, ancient and modern. And, surely, this is correct enough, though no single student—not even such a *decus ævi* as a Grotius or a Vinogradoff—can explore more than a small portion of this vast field. But Professor Sarfatti adopts the view of many modern writers that it is better to keep in a separate compartment the comparative study of early legal institutions in different countries. Italian writers now call this branch legal ethnology or ethnological jurisprudence.

The author of this book would reserve the term " comparative law " for that study of the laws of several countries which has a practical end in view, namely to borrow or adapt foreign laws, or even to bring about partial or total unification of two or more systems (p. 38). He takes up pretty much the same position as that of Professor Edouard Lambert in his masterly report to the International Congress of Comparative Law which met at Paris in 1900. Professor Lambert's view was that there are two sciences of comparative law which must be distinguished. They are: (*a*) the comparative history of the legal institutions of different countries. This includes ancient laws as well as modern. It is a *science sociale*, the *science des phénomènes juridiques*. (*b*) The science of comparative law as an element of *droit positif*. Here the range of inquiry is much more limited. The aim is to discover the rules which are common to two or more systems of law—the *dégagement du droit commun législatif*—with a view to bringing these laws more closely together, and, if possible, to unify them.

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[1] Mario Sarfatti, *Introduzione allo Studio del Diritto Comparato*, 1933. (Torino : Giappichelli.) Pp. vi + 133. 15 lire.

It is of little use to compare legal systems which have no kinship with one another. Professor A. Esmein suggested, in the discussion at Paris, that, instead of calling their second science by the same name as the first, it would be better to call it "comparative legislation," using, no doubt, the word *législation* in a wide sense.

As to the amount of unification of legal systems which is possible, or is even desirable, there is room for much difference of opinion. Professor Sarfatti speaks of unification as a *lontano miraggio*, where *miraggio* means the ultimate aim. But a mirage in the more usual sense is something at which we never arrive. It is tempting to suggest that there is a good deal of mirage about these plans for unification of different legal systems. Within a narrow field, comprising such matters as bills of exchange, bills of lading, the reciprocal execution of judgments and a few others, uniformity is desirable, and a great deal has been done to secure it. But in many other branches of law, such as the personal law, and the law of real property, the advantages of unification are less obvious. National sentiment and long familiarity incline people to prefer their own law.

We have an admirable illustration in this island. England and Scotland have for many centuries had different legal systems. They have had one King since 1603, and one Parliament since 1707, and yet there has been no unification of their laws. Scots law has been assimilated to English law in some fields, but it remains, none the less, a distinct system, and a project for unification would not have the least chance of success.

Nor is the story of the *Progetto* at all encouraging. The differences between the Italian and the French laws as regards contracts and torts, and the other matters which fall into the category of *obligations*, were not very substantial. It was felt, reasonably enough, that here was an opportunity for unification. Commissions were appointed, and after years of discussion a draft was approved in 1927. But so far it has been pigeon-holed both in Rome and in Paris.

It seems to me unwise to stake the fortune of comparative law on its success or failure in bringing about the unification of legal systems. Without that, the comparison of laws has in the past rendered great service, and it may continue to do so. We must not forget that in most of the countries of Western Europe (including Scotland, but excluding England, Ireland and the Scandinavian States) the Common law was largely built up by writers who applied the comparative method. That fusion of Roman law with "barbarian" law in various proportions, which resulted in the modern laws of France, Germany, Italy, Holland, Spain and Scotland, was to a great extent the work of the civilians of the seventeenth and eighteenth centuries. Writers such as John Voet, Grotius, Stair, Pothier and many others were nurtured on the Roman law. In all their respective countries a great deal of Roman law in a simplified form had been "received." Some important branches of law, notably "obligations," were almost wholly Roman. In other branches of law local customs governed, but generally, in the silence of the customary law, Roman law might be applied as *ratio scripta*, if not as *jus scriptum*. The work of the "civilians" was to help to shape systems of law in which the two elements were combined, and for this, continual comparison was needed. The early "institutional" writers in Scotland, for example, were great practitioners of comparative law, though they had never heard that expression.

M. Jourdain said: *Par ma foi, il y a plus de quarante ans que je dis de la prose sans que j'en susse rien.*

Sir George Mackenzie, on the title-page of his "Criminal Law" published in 1678 at Edinburgh, says:

> Wherein is to be seen how the Civil Law and the Laws and Customs of other Nations doth agree with and supply ours.

And Lord Stair, in the preface to his *Institute of the Law of Scotland* in 1681, expresses, with his usual grace of style, his belief in comparative law.

> A great part of what is here offered is common to most civil nations, and is not like to be displeasing to the judicious and sober anywhere, who doat not so much upon their own customs, as to think that none else are worthy of their notice.

Stair founds his work upon "material justice, the common law of the world," and "on the expedients of the most polite nations, . . . especially those which have been invented or followed by this nation."

Professor Sarfatti gives many illustrations of comparative law being applied in the past, from the rather doubtful case of the Twelve Tables downwards. He does not mention, however, one of the most important and the least known. Dean Roscoe Pound tells us that it was comparative law which preserved the English Common law in the United States. There was a period when its authority there was seriously challenged. It had to be defended by comparing it with other laws.

> A skilful use of comparative law, seeming to show the identity of an ideal form of the English common-law rule with an ideal form of the Roman-law or civil-law rule, and thus demonstrating the identity of each with a universally acknowledged law of nature was the most efficient of the instruments by which Kent and Story and many who followed them were able to insure that the English common-law should be the basis of the law in all but one of the United States (*Acta Acad. Jurispr. Comp.*, i, p. 195).

With great respect to the distinguished writers who say that " comparative law," properly so-called, must have a practical aim, I doubt the reasonableness of this opinion.

Whether comparative law is suitable for undergraduates is questionable. Like marriage, it is not to be taken in hand lightly or wantonly.

It is much to be hoped that Professor Sarfatti's excellent introduction should find an English translator.

F. P. WALTON.

PRIVATE INTERNATIONAL LAW.

EACH of these little books [1] contains lectures delivered at the Academy of International Law by a highly esteemed authority upon a subject of importance and interest. Of the two, those of Mr. Fabre Surveyer are most attractive to the English reader, not necessarily on account of the treatment but by reason of the matter. The development of the idea of domicil in English law is naturally more familiar to the English lawyer than is Canadian doctrine and practice. The presentation of the law of domicil by so eminent an authority on the subject as Mr. Bentwich must, nevertheless, always be useful to the student and practitioner. His industry and learning enable him to assemble a notable body of less-known decisions, the significance of which he expounds with conspicuous clarity. Valuable in particular is his well-documented discussion of the vexed question of the recognition of polygamous marriages, in which he brings out the urgent need of a clarification of the attitude of the English courts on the subject.[2] Another important section concerns the dependence of divorce upon the domicil of the husband. Mr. Bentwich refers to the remarks of Lord Morris [3] upon the present situation and the opinion expressed by the Institute of International Law at the 1931 meeting. That jurisdiction in divorce should be left to depend upon the whim or convenience of a possibly malicious husband is intolerable. The Palestine Government, faced with an analogous situation in which matrimonial law and jurisdiction varied with the religious subterfuges and vagaries of the husband, promptly nullified the effect of his solitary ecclesiastical wanderings by tying him down to the jurisdiction of the religion of the marriage or of the last common religion.[1] There is much to be said for a solution upon such lines.

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[1] *Le Développement récent du principe du Domicile en droit anglais*, par Norman Bentwich, 1935, p. 91. *La Conception du droit international privé d'après la doctrine et la pratique au Canada*, par Edouard Fabre Surveyer, 1936, p. 103. Académie de Droit International. (Paris : Recueil Sirey.)

[2] See, further, Dr. Vesey FitzGerald in L.Q.R. xlvii, pp. 253 ff. ; Mr. Beckett in L.Q.R. xlviii, pp. 341 ff.

[3] In *Grant* v. *Grant*, (1931) Sessions Cases, p. 238.

Some of these problems come also to be considered by Mr. Justice Fabre Surveyer. Remark that, in discussing *Att.-Gen. of Alberta* v. *Cook,*[2] he mentions how Alberta forthwith retorted by giving to a married woman judicially separated a power to choose a domicil distinct from that of her husband.[3] While speaking of the effect of change of domicil on matrimonial rights it is, perhaps, permissible to remark that we could find no reference to the important case of *Astill* v. *Hallée* ;[4] in the absence, however, of both Index and Table of Cases it is difficult to be sure.

Of special value in Mr. Fabre Surveyer's lectures are the frequent comments upon the relations of the provincial courts *inter se* and of these with the courts of other territories of the Empire. The situation is sometimes bizarre. Most will agree that the English rule which requires foreign law to be proved as a fact has not infrequently unfortunate consequences. It is not a sensible rule, and is possibly only an expression of insular prejudice. In Canada its consequences are sometimes odd in the extreme. Seeing that the English rule is adopted by the courts, the law of England has to be proved as a fact if in any case it is pleaded as a foreign law applicable thereto.[5] If, however, it is not pleaded counsel and judges may make use of their own knowledge. So also of French law. Every lawyer in Quebec has studied the French Civil Law and is reasonably competent to form an opinion on a question of French law. Yet the court may be in the ridiculous position of being obliged to pronounce a judgment based on affidavits as to French law which the judges well know to be ill-instructed.

Subject to certain legislative exceptions, the Provinces, we are told, treat one another in this connexion as foreign countries. However, some of the exceptions are happily liberal. Thus Manitoba, since 1895, has provided that the provincial courts shall take judicial notice of the laws of every Canadian Province, of Great Britain, of Ireland, and the dependencies and of every part of the United States. Saskatchewan and British Columbia have followed this admirable precedent. Mr. Fabre Surveyer mentions a case[6] in which the British Law Ascertainment Act, 1859, was brought down from its dusty shelf though not actually used. This Act figures in the First Schedule to the Foreign Jurisdiction Act, 1890, and has probably been extended throughout the Empire. Is it ever used ?

Enough has been said to indicate the interest of these lectures. They suggest many reflections as to Private International Law. But we must refrain.

F. M. G.

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[1] Change of Religious Community Ordinance, 1927, s. 7.

[2] [1926] A.C. 444.

[3] Law No. 5 of 1927 ; see *Journ. Comp. Leg.*, vol. xi, pt. ii, p. 43.

[4] (1877) 4 Q.L.R. 120.

[5] Fabre Surveyer, p. 53.

[6] *Op. cit.*, p. 65.

THE INSTITUTION OF PROPERTY.

THIS is a work [1] by a well-known economist who examines the institution of property. In his survey he investigates the conceptions of property in Roman Law, the history of Anglo-American Property Law, and the modern American Law comparatively. It is not essentially a comparative legal study, but it involves the writer in an examination of considerable detail, though he is concerned primarily with the conceptions underlying the legal rules and with the theories of property which have been propounded by jurists. His purpose appears to be to ascertain the real nature of the institution of property and may be best expressed in his own words (at p. 413) : " The brief and summary studies, in the foregoing chapters, of the legal concepts and clothing of the institution of property have given us a view of the sources of our modern Anglo-American legal ideas ; the Roman strain from early times through to its classic development supplying a small part of the modern law and practically all the modern theory, and the English strain supplying the greater part of the law and but little of the theory. We have seen these rules and viewpoints of the law clashing with the economic facts and these theories clashing with the legal facts, both together producing considerable bewilderment in the current application of the law to modern American conditions. It now remains to complete the process of stripping off the legal clothing in order to see through to the substance of modern property, and thereafter to endeavour to complete our analysis of the degree to which the scheme of legal facts and legal theories of the present day offers a true picture, or to what extent and in what ways, on the other hand, this picture requires modification or new development in order to represent reality. Nor is this a too presumptuous undertaking, for it will generally be agreed that at all times and places both the theory and the practice of law have lagged to a greater or less extent behind the practices of society with which they attempted to deal."

Such a study is not, therefore, so much of importance as a comparative study of legal systems as a salutary corrective to the complacency of lawyers in their own capacity to perceive facts and to comprehend and apply logical principles. It should be studied by all interested in jurisprudence, and more particularly by those concerned with what, for want of a better term, is called comparative jurisprudence. It is stimulating to be faced with the criticism of law and theory offered by a lay economist who has made a really serious and thorough study of the subject with which he deals, but standing outside the preconceptions from which most lawyers suffer.

The work is manifestly controversial and offers tempting bait to a reviewer that is well-nigh irresistible, both in generalities and in detail.

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[1] *The Institution of Property.* By C. Reinold Noyes. (New York and Toronto: Longmans, Green & Co.; London: Humphrey Milford, 1936.) Pp. xiv + 645. 25*s*. net.

For example, take the sentence (on p. 18), beginning : " *If* we were able to accept the *extreme* legalistic view that it [property] is created by law and exists only in the contemplation of the law, . . ." (italics the reviewer's). This appears to beg a fundamental issue in the first place, and in the second to ignore the essential feature that a lawyer cannot either in theory or in practice strictly regard any other view. There are lawyers, not ill-educated in other spheres, who feel that where judges have strayed into non-legal realms to aid their judgments the result has not been conspicuously successful. It is not very easy, seeing that " property " is the creation of law, how it can exist save in the contemplation of the law. It is thought that no examination, historical, analytical, or comparative, of a legal system or legal systems can disclose the existence of " property " outside their contemplation and to include any other matter must be to enlarge the content and consequently the significance of the term. To attempt to draw conclusions by enlarging the scope of definitions beyond their accepted sphere must seem to the lawyer rather a dangerous method of logic. On the other hand, to argue that the law is not wide enough to give effect to all the facts of modern civilization does not appear to call for a comparative and historical account of the existing law.

The same difficulty, arising from two fundamentally different points of view, appears, so it seems to the reviewer, for example, at p. 265, where the author remarks that the medieval structure of landed property in England " fails to fit, if indeed it does not deny, the modern as well as the Roman concept of ownership." While not attempting to discuss the existence of a conception of ownership in medieval law, it is suggested that in English law to-day this structure remains, though that complex of rights and liabilities known as tenure has been replaced by another complex not so dissimilar, known as estate ownership. It is, of course, possible to suggest that an estate owner under the Settled Land Act, 1925, is not an " owner " according to modern (" economic ") conceptions of property, but it is thought that perhaps the lawyer would say that the " property " is his estate, though manifestly as a " thing " it is merely a legal conception having no real existence outside the realms of law. In fact, this peculiar capacity of the law to find and endow rights over corporeal things with the legal nature of things is to be seen even in personal chattels ; so a bailment is becoming more, not less, a " thing " in the eyes of law capable of being owned, as for example in the special legal position of hire purchase agreements. Essentially, whatever the layman may say or think, the lawyer must recognize that both " things " and " persons " are legal entities having no necessary physical existence. Law, like philosophy, is, after all, a system of metaphysics, and though, like philosophy, it has a definite connexion with physical facts, it may also, and does, extend beyond those physical facts, and in the case of law can, and does, enforce the recognition of its conclusions.

But perhaps the most stimulating of all these controversial observations is found in the passage first cited referring to the clash between legal theories and facts of the law. The expression is somewhat ambiguous, but it appears to concern writers on jurisprudence and the principles of law laid down in the courts, and this impression remains after a perusal of the work. The writer of this review, not being a "jurist," is not concerned to defend "jurisprudence," since the jurists seem well able to conduct their own defence, but at least it might be suggested that the Common Law depends upon principles, not facts, and that these principles have a logical development and are not entirely obscure, though the changing centuries and the fallibility of human nature have left blemishes and imperfections. With the writers on jurisprudence the courts so far have had little to do.

It must be apparent that this reviewer is not prepared to accept wholeheartedly either the dicta or the conclusions contained in this book, but he is very ready to recommend its earnest perusal to those who feel with him that our property law is imperfect, and that in some respects the law would benefit from change, if only that certain practices and certain circumstances outside the scope of the law might be recognized, and that certain legally recognized transactions or facts should be endowed with different legal characteristics.

H. Potter.

MEDIEVAL REPRESENTATION AND CONSENT.

The title of Miss Clarke's book[1] would suggest a theoretical study of political theory, and the sub-title would seem to promise the much-needed *apparatus* to accompany the text of the famous *Modus Tenendi Parliamentum*. Both undertakings are in some measure fulfilled, while in addition she has contrived to make a surprisingly fascinating book out of material which might well have been somewhat arid. Indeed, the elusive mystery of the *Modus* makes parts of the book read like a work of detection, and Miss Clarke has missed no opportunity of communicating the joy she felt in following up the numerous but ambiguous clues. A preliminary examination showed that the *Modus* contained clear ideas about representation and about consent, placed great stress upon the power of the Commons and gave a prominent place to the clerical proctors as part of the Commons. Two chapters follow, full of valuable constitutional history, upon the bitter conflict over the Crown's attempts to tax the clergy in England and Ireland, especially under Edward III. From this "it seems that the circumstances of the period 1369 to 1375 were just of the kind to provoke the expression of the doctrines we have traced in the *Modus*." But no experienced reader would expect to find the mystery solved as early as page 32; we soon learn that there are clues in Ireland, "in fact, the clergy of the Irish Parliament are the clergy of the *Modus* alike in status, rights and duties." Then comes the almost incredible story of the Irish version of the *Modus* found on a prisoner of war in 1419 and then exemplified under the Great Seal of Ireland by the government of that time. Why an apparently anti-government tract, found on a captured insurgent, should be passed under the Great Seal is a mystery. Miss Clarke increases it by thinking that the prisoner " forced " his captors. More recently, the exemplification has turned up, Great Seal and all—in California. Some neat genealogical study provides the explanation, and the authenticity of the 1419 document is established. It is the Lancastrians who are regarded as the exponents of Parliamentarianism in England ; in Ireland it seems to have been the Yorkists, and this, suggests Miss Clarke, is due to the influence of the *Modus*. That influence may be clear in the fifteenth century, but Miss Clarke argues that Ireland was steadily showing the influence of the *Modus* long before 1419, and traces it back (on very slender evidence) to the fourteenth century. So a new search for a possible date begins, and the reign of Edward II comes under careful scrutiny. A most interesting interpretation of the much-debated Statute of York (1322) is offered, and the stress laid by that statute and *Modus* upon the place of the Commons in Parliament, together with many other indications, leads to the years 1322–4 as the probable date (which tempts one to connect it with Pembroke's party). If the *Modus* can thus be related to a definite date and political environment, its interest is much increased, for it would then be possible to regard it as a sincere attempt by some author to state his considered views on Parliament. Unfortunately there are many similarities of detail between the histories of Edward II and Richard II. Both dates have been suggested, and although Miss Clarke's arguments suggest a clear balance in favour of the earlier reign, a case might perhaps be made out for the later—we understand that such an argument is in fact likely to appear shortly.

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[1] *Medieval Representation and Consent: a Study of Early Parliaments in England with Special Reference to the Modus Tenendi Parliamentum.* By M. V. Clarke. (London: Longmans, Green & Co., 1936.) Pp. 408. 18*s*.

Around the problem of the *Modus* Miss Clarke has assembled a rich mass of detail illustrating political thought and practice in England and Ireland. Her study of the ecclesiastical question is particularly welcome, for there is little said about it in the usual books, and it is especially important for the development of the idea of consent since the Church refused to admit any other principle upon which she could be taxed. The *Modus* shows the clerical proctors as an integral part of Parliament, a position which they ceased to hold after their secession about 1332. Miss Clarke is surely right in feeling that this schism was momentous, suggesting that " the real losers were, in the first place, the clergy themselves who were shut off from the political centre of the national life, and secondly, the lay Commons in Parliament, who lost in the proctors men who would have brought to their deliberations another learning and another discipline to balance the narrow caution of the lawyers." The incident clearly deserves more thought than historians have given it so far ; it occurs at the moment when English law and institutions entered upon their period of isolation, untouched by foreign influences. If the proctors had continued their collaboration and had become effective members of the now active legislature, English private law might have run a different course. Clerical influence on constitutional theory, however, is less easy to predict. The letter of Cobham (p. 169) contains a disquieting attribution of *plenitudo potestatis* to the Crown, coupled with a recommendation to observe Parliamentary forms merely as a matter of expediency.

The concluding portions on taxation and consent, and on representation, are vivid discussions of material which is mostly familiar. The jury is properly treated as representative, but more should have been said of the attorney and representation in court. Ecclesiastical precedents are given for the office of Speaker, and there is an interesting passage on the majority principle, reaching (independently, it seems) the same conclusion as Dr. Prausnitz (*Politica*, 1934). The work is a highly individual treatment of political thought and practice which deserves careful attention. The freshness and enthusiasm with which it is written make it very attractive reading and deepen the regret with which we learn that it is a posthumous publication.

T. F. T. PLUCKNETT.

BANKING AND BILLS OF EXCHANGE.

THE issue of this, the latest, edition of a notable textbook [1] is a reminder to English lawyers of the wealth of material which is to be found in the case law of the British Dominions. A reminder seems to be needed because the decisions of the Dominion judges are apt to be overlooked, both by practitioners and legal authors in England, though Dominion cases very rarely escape notice in the United States. It would be incorrect to attribute this state of affairs entirely to the attitude of indifference which English lawyers are prone to assume towards any legal material which emanates from abroad—because it is in some measure due to the inaccessibility of the Dominion law reports and textbooks which are only available in a few of the law libraries of this country, and even then not always in an up-to-date form. This is a regrettable circumstance which calls for action such as is foreshadowed in that part of the report of Lord Atkin's Committee on Legal Education which deals with the library question ; and it is to be hoped that such action will not be long delayed.

In any event it is a reproach to the home of the Common Law that so little attention should be paid in this country to the development of the law in the kindred jurisdictions overseas. The law of negotiable instruments is an instance which is directly in point. The Imperial Bills of Exchange Act, 1882, with minor variations, has been adopted throughout the British Commonwealth, and the case law of Australia, Canada and

[1] *Banking and Bills of Exchange.* By J. D. Falconbridge, M.A., LL.B., K.C. 5th Edition. (Toronto : Canada Law Book Company, 1935.) Large 8°. Pp. lxv + 1030. $12.

New Zealand is often of very great value in throwing light on some of the dark corners which are still to be found in what is generally admitted to be on the whole a model of successful codification. One of the services which Dean Falconbridge's masterly treatise has rendered to the development of the law lies in his analysis of the Canadian cases, but it must not be thought that his book is merely an exposition of the Canadian law of negotiable instruments. It is much more than that. In the first place it contains a very detailed discussion and criticism of the post-war decisions of the English courts such as is not to be found in any of our standard textbooks or commentaries. Secondly, it embodies a comparative study of the laws of the British Empire and the United States in a form which will appeal to English readers. Last, but not least, there is no other treatise which deals so comprehensively and so critically with the obscure and difficult topic of the rules of English law which govern conflicts of law in the case of negotiable instruments. This is a branch of learning which Dean Falconbridge has made peculiarly his own, and we thus get a treatment of the subject which calls for the very serious attention of all who are interested or concerned in the very difficult problems with which it deals. The law of England has hitherto failed to grapple effectively with the unusual and extremely difficult situation which arises when there is a foreign element in a dispute relating to the transfer of choses in action. Dr. Cheshire has done much to elucidate the question as a whole, but in the special field of the obligations resulting from the negotiation of bills, notes and cheques, Dean Falconbridge has given us a critical study which stands alone at the present time as a survey of the problems which arise and of the operation of existing rules in the attempt to arrive at a solution. The Act of 1882 failed to deal with the matter in an adequate manner, and it is not surprising that the draftsmen of the American Uniform Law of Negotiable Instruments should have preferred to leave questions of this kind to be dealt with by the existing rules of the Common Law, and did not follow the lead given by s. 72 of the English Act. It must be admitted that the question of the rules which govern conflicts of law arising out of negotiable instruments is one of the least satisfactory features of private international law in all countries, and it is doubtful whether the Geneva Uniform Laws of 1930 and 1931 can be regarded as being more than a somewhat inadequate attempt to deal with the situation. It is far from easy for a practitioner to advise his clients on problems of this nature, but he will profit greatly from Dean Falconbridge's reasoned analysis of the difficulties which arise and from his searching criticism of the provisions of s. 72 of the Act of 1882 and the very difficult case law which has been engrafted on it.

So far we have been dealing solely with that part of the volume under review which relates to the law of negotiable instruments, but it also contains a detailed commentary on the Canadian Bank Act which will be of great value to those whose legal practice or business relations bring them into contact with banking as carried on in the Dominion. The reviewer has already made an appeal to the author to consider the possibility of the separate publication of that part of his work which deals with negotiable instruments, and he ventures to repeat it because there is no one better equipped than the learned author of this very accurate and scholarly treatise to present the law of negotiable instruments in one of its most important aspects, namely the form which it has assumed, not merely in England, but in the English-speaking countries taken as a whole.

H. C. GUTTERIDGE.

ENGLISH AND AMERICAN BANKRUPTCY LAW.

Two reflections immediately strike one on reading this book.[1] The first is as to the great value of the work carried on by the Institut de Droit Comparé de Lyon. The author of this volume, which we may at once acclaim as a real contribution to legal science, explains that the inspiration of Professor Lambert, the Director of the Institut, and the material there placed at his disposal alone made the book possible. The second is as to the real understanding and appreciation of Anglo-Saxon legal institutions which is at the present moment being shown by Continental jurists. They often appear to have a juster appreciation than we have ourselves. English commercial law, and perhaps bankruptcy in particular, have been receiving special attention of recent years all over the Continent. This is no doubt understandable in the light of M. del Marmol's statement that this country is practically the sole important state which did not require to alter its laws as to debtor and creditor as a result of the economic depression.

M. del Marmol commences his analysis of English and U.S.A. bankruptcy law with an historical introduction which is of very great interest. He shows how the English law culminating in the Bankruptcy Act, 1914, has gradually evolved over a period of three hundred years, during which time a system of considerable flexibility, publicly controlled but leaving considerable scope to individual initiative, and tempered to the requirements both of debtor and creditor and the public well-being, has been worked out. In the U.S.A., on the other hand, the Federal Law of Bankruptcy is of comparatively recent origin, has been promulgated with too little regard for the experiences of Great Britain, and is defective, as M. del Marmol thinks, in a number of respects. There are short sections on the position in Scotland, Canada and other parts of the British Empire, but the analysis of the systems prevailing in those countries is not otherwise pursued.

In the second and main part of his book M. del Marmol gives an accurate and lucid account of the principles and administration of bankruptcy law in England and in the U.S.A. Avoiding the excessive detail which makes the average textbook on the subject so deadly dull, he nevertheless contrives to give a sufficiently complete picture of the subject admirably illustrated from the more important leading cases. As Mr. Wortley says in a foreword, even the technical aspects, such as preference and relation back, are dealt with in a very satisfactory manner. At the end of each section on the English law there is added a statement of the analogous rules in the U.S.A. As is natural in a system of comparatively recent origin, the jurisprudence there is much poorer, and many rules which are of great practical consequence in English bankruptcy are not met with at all in the U.S.A. M. del Marmol is clearly of opinion that the more complicated system gives by far the better results, but he has to admit that the expense of working it is very considerable. The American system, he thinks, is much too favourable to the debtor, and is marked by an almost complete absence of public control.

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[1] *La Faillite en Droit Anglo-Saxon.* By Charley del Marmol. (Paris : Librairie générale de Droit et de Jurisprudence. Brussels : Etablissements Emile Bruylant.) Pp. xxviii + 440. 40 fcs.

In Part III, entitled " Legal Methods of avoiding Bankruptcy," M. del Marmol treats of compositions and schemes of arrangement. He stresses the importance of the deed of arrangement, which he finds is resorted to in the majority of cases where the amount involved is substantial and the debtor's estate large enough to deserve business-like handling. The expense attached to such an arrangement is also very much smaller than that of proceedings in bankruptcy. In the U.S.A. a somewhat similar system prevails which has certain advantages over our own, but is apparently more open to abuse.

The final chapter of " critical appreciation " is an admirable piece of work in which M. del Marmol singles out those features which he regards as the most vital of the English and American systems, and considers how far their introduction may be desirable in the Latin countries. This is a sane and balanced piece of work. Many of the institutions which work well here would not, he thinks, prove equally successful, *e.g.* in France. On the other hand, that great principle by which the honest bankrupt is freed and discharged from his debts and enabled to resume his business life in the community, which he finds is perhaps pushed to excess in the U.S.A., is too little regarded in the Latin countries and might well be applied there with good results.

Great credit is due to M. del Marmol for the accuracy of his English law and to the compositor for his success with the English quotations, which are far more accurately produced than is usual in foreign works. The only serious inaccuracy of law which we have noted is in relation to the position of the infant debtor. M. del Marmol has not sufficiently appreciated the effect of *Leslie* v. *Shiell,* [1914] 3 K.B. 607.

Finally, we must notice the remarkable introduction by Professor Edward Lambert, which is in part a valedictory address on his resigning the directorship of the Institut de Droit Comparé de Lyon. It contains many profound observations as to the study of comparative law. May M. Lambert be spared long years for work and research in his beloved subject.

R. S. T. CHORLEY.

THE ENGLISH LAW OF BANKRUPTCY.

Dr. Eckstein has performed his difficult task with commendable clarity.[1] As he explains at the outset,[2] in comparison with the German law, the English law of bankruptcy is very complicated. This monograph will be of interest to all comparative lawyers by reason of frequent comparisons of the two systems by an author who has evidently mastered them both.

Thus, England, he mentions, is the home of the right of stoppage *in transitu*, although the consequences of that right differ in the two countries.[3] Nor is the author any the less at ease in expounding the intricacies of a topic such as reputed ownership.[4] The book is amply documented with references not only to the standard works—including Cheshire on *Private International Law*—but also to the large variety of case law which, since 1883 in particular, has slowly built this " creation of statute law " into a coherent and rationalized system. Nor has the learned author omitted the recent authorities, such as *Official Assignee of Madras* v. *Mercantile Bank of India* [5]—now the leading modern exposition on letters of hypothecation. In the last part of the work he has some suggestive views upon the international aspects of bankruptcy.

G. Webber.

THE DOCTRINE OF ULTRA VIRES.

Volume 10 of the *Beiträge zum ausländischen und internationalen Privatrecht* of Berlin is a characteristically thorough monograph, written by Dr. Clemens Schlink, upon the doctrine of *ultra vires* in English law.[6] English courts have not been influenced by legal theories as to the exact nature of the legal personality of juristic persons; the subject, moreover, is one that will long remain within the realm of scholastic disputation. The author distinguishes the authority of a corporation, on the one hand, and the capacity of its agents, on the other. *Ultra vires* has been used in these two senses, only the first of which is strictly accurate. The liability of a corporation for its *ultra vires* torts is not yet settled, but the majority of the text writers appear to be agreed upon the principle stated, most broadly, by Salmond.[7] Dr. Schlink, examining the matter juristically, maintains that at basis capacity in English law is not so much a quality of personality, but is really no other than legal personality in its active manifestation. " Passive capacity " (*Rechtsfähigkeit*) he differentiates from " active capacity " (*Handlungsfähigkeit*). The distinction, he says, is pointed out in *Earl of Shrewsbury* v. *North Staffordshire Railway Company*.[1] Corporations are bound within certain limits only, and even if a corporation derives benefit from an *ultra vires* act, then—subject to *Sinclair* v. *Brougham*[2]—no liability attaches to the corporation as such. Thus, in *Abrath* v. *North-Eastern Railway Company*,[3] Lord Bramwell says:

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[1] *Das englische Konkursrecht*, von Dr. Felix Eckstein. (Berlin and Leipzig: Walter de Gruyter & Co., 1935.) Pp. xv + 351.

[2] At p. 3. [3] At p. 129. [4] At p. 151. [5] (1935) 152 L.T. 1170.

[6] *Die Ultra-Vires-Lehre im englischen Privatrecht*, von Dr. Clemens Schlink. (Berlin and Leipzig: Walter de Gruyter & Co., 1935.) Pp. xvi + 183.

[7] *Law of Torts*, (1936) 9th ed., at p. 61. See also Brice, *The Doctrine of Ultra Vires*, (1893) 3rd ed., pp. 435–7; Street, *The Doctrine of Ultra Vires*, (1930), p. 256 *et seq.*; Schlink, at pp. 145, 146.

> If the directors, even by resolution at their board meeting or by order under the common seal of the company . . . were maliciously . . . to order a prosecution, . . . no action would lie against the corporation, because the act on the part of the directors would be *ultra vires*; they would have no authority to do it.[4]

Giving a corporate form to such an act cannot make it *intra vires*, nor, on the other hand, does it prevent the act from being the act of those who cause it to be done.[5] Once corporations were for civil purposes regarded as persons, the ordinary doctrines of agency and of master and servant could not but be applied: *Citizens' Life Assurance Company* v. *Brown*.[6]

Not only the bibliography but the book bear testimony that Dr. Schlink has assimilated most of the English learning on the subject. His chief authorities are, of course, the monumental work of Brice (1875) and the modern exposition by Street (1930). Nor has he neglected later essays, such as that of Professor Goodhart.[7] He has digested his material in a worthy juristic manner; and not the least part of his valuable examination is the critique of the English and the German systems.

G. Webber.

ROMAN LAW AND COMMON LAW.

For the learned authors of this treatise[8] Roman Law means the Roman Law of the Romans, perhaps also of the Byzantines, not the Roman Law of the Civilians or Pandectists. The term "common law" is used in the wide sense in which we contrast the countries of the common law on the one hand with countries of the civil law on the other. "At the same time it so happens, and largely because of the earlier publication of *Equity in Roman Law*,[9] that the English rules and institutions described in this book come more from the common law than from equity. Finally it must be noted that the subject is the common law as understood in England" (not, *e.g.*, in the United States, where it has diverged in some respects from the original pattern).

The authors observe that "It may be a paradox, but it seems to be the truth that there is more affinity between the Roman jurist and the common lawyer than there is between the Roman jurist and his modern civilian successor. Both the common lawyer and the Roman jurist avoid generalizations and, as far as possible, definitions. Their method is intensely casuistic. They proceed from case to case, being more anxious to establish a good working set of rules, even at the risk of some logical incoherence which may, sooner or later, create a difficulty, than to set up anything like a logical system. That is not the method of the Pandectist. For him the law is a set of rules to be deduced from a group of primary principles, the statement of which constitutes the " *Allgemeiner Teil* " of his structure. . . . His method is not that of the Roman or of the common lawyer.

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[1] (1865) L.J., Ch. 156, 172; cited at p. 64.

[2] [1914] A.C. 398, 449.

[3] (1886) 11 A.C. 247, at p. 251.

[4] Cited at p. 136.

[5] P. 137.

[6] [1904] A.C. 423; cited at p. 143.

[7] "Torts of Corporations," 3 *Camb. Law Journ.*, (1926) p. 350 *et seq.*

[8] *Roman Law and Common Law: a Comparison in Outline.* By W. W. Buckland, LL.D., D.C.L., F.B.A., Regius Professor of Civil Law, Fellow of Gonville and Caius College, and Arnold D. McNair, LL.D., Whewell Professor of International Law, Fellow of Gonville and Caius College. (London: Cambridge University Press, 1936.) Pp. xviii + 353. 15*s*. net.

[9] W. W. Buckland, University of London Press, 1911.

In his earlier work, *Equity in Roman Law,* Professor Buckland's aim was " to show the way in which the Roman lawyer worked. The institutions with which he dealt were subordinated to the way in which he worked on them. In this book, on the other hand, it is the rules and institutions themselves that are compared. These are no doubt to some extent the work of the lawyers, but that is not true of the most basic notions : these were formed in their essentials long before there was such a thing as the professional study of law. They may be regarded as not being the lawyers' work, but the materials on which they worked."

Such described in their own words is the authors' plan. The comparison of the two systems is worked out in a series of chapters dealing with the topics of the civil code very much in the order of Justinian's Institutes.

In the universities of this country, where the study of Roman Law is to-day, and is likely to remain, conscientious rather than profound, an intelligent student cannot fail to be struck by a real correspondence between the mental processes of the Roman jurists and of our own judges. But this resemblance tends to obscure the fundamental differences between the legal institutions of the two peoples. The conception of the family is entirely different. *Dominium* is not the same as ownership—and so on through the whole field of the private law. This book will give the student a right orientation. It will make him alert and critical. The authors express their belief that " one of the main juridical features of this century must be a big advance in the comparative study of law." This view has found expression in many quarters. But one would wish to see more recognition of it in the political and legal life of this country. Comparison in itself, to recall a phrase of the late Professor Van Vollenhoven (though not his application of it), is not much more worth while than to tabulate the words for horse and house in the various European languages. It may indeed serve as a tonic and stimulus to minds (mainly of the young) capable of reacting to such influences—an object which this book is excellently calculated to procure. But the true end of comparative legal study must surely be to improve the laws of our country and to promote easy and friendly relations between the different countries of the world. One of the international societies which concerns itself with such studies has taken for its motto: "Par le droit, vers le mieux, pour l'humanité."

R. W. L.

ROMAN LAW.

THIS admirable treatise [1] on the characteristics underlying the Roman Law called aloud for translation, and Mrs. Wolff has rendered a real service to English students of the subject. As the author has revised his work, the book may fairly be called a second edition, in English. The translator has done her work excellently: very rarely can exception be taken to the rendering ("chiefly personal," p. 25, "intercession," p. 173, "delegation," p. 35, a few words omitted, p. 143, l. 3) and no case has been found in which the sense was materially affected. One or two slight differences which have been noted are no doubt due to the fact that the text translated is not quite the same as that which we possess. Hardly ever are we made conscious that the book is a translation. (On p. 40, n. 3 the English reader may not at first recognize the Book of Numbers in "4 Mose."). The index has been revised and somewhat enlarged.

The merits of the original work were so widely recognized on its first appearance that little need be said of it. The revised text presents a few unimportant omissions (*e.g.* on p. 40) and some additions. The fact that public law was neglected by the jurists is now more clearly brought out (p. 29) and some remarks are added on the form of English statutes (p. 49). Most of the additions are in the notes; they are chiefly further references to literature, especially to books likely to be readily accessible in England. The author tells us that he found no need to make more serious alterations. Changes of doctrine were indeed hardly to be expected. One may regret to see the statement retained (p. 17) that in the American courts "the guidance of legal science is lacking" (which ignores the great use made in the Superior Courts in U.S.A. of the writings of distinguished jurists) and that (p. 98) Cicero defined *res incorporales* (when he was defining something different). One may respectfully dissent from the author's well-known views as to the almost complete "fungibility" of the great jurists (p. 106). These are, except the last, small matters. The author and the translator are to be heartily thanked for giving us a book which should be studied by all who are interested in Roman Law.

W. W. B.

STATE PAPERS.

THIS is a kind of compilation [2] which requires the utmost accuracy and a definite standard of selection from the vast mass of available material. With regard to both these requirements the present volume maintains the high level of its predecessors, and the very fact that in the matter of selection there may be room for a point of view different from that adopted in the Librarian's Department shows that the task involved in the preparation of the volume is neither easy nor merely mechanical. There will be general agreement about the desirability of including municipal and constitutional enactments and documents which are of interest for international law, like the statement of policy of the British Government in 1930 regarding the Channel Tunnel; the Letters Patent constituting the office of Governor-General of the Dominion of Canada; or the Ordinance of the Government of India providing against the publication of statements likely to promote [*sic*] unfriendly relations between His Majesty's Government and foreign governments. The same applies to the inclusion of foreign fundamental laws and constitutions like the Spanish Constitution of 1931; the Constitution of Yugoslavia of the same year (which gives the authority of a constitutional rule to the principle of non-extradition of nationals); the Fundamental Principles of the Government of Afghanistan (providing, *inter alia*, that foreign subjects have " absolutely no right to own land in Afghanistan); and the Constitutions of China and Outer Mongolia. The various multilateral conventions are usefully supplemented by lists of ratifications and adhesions. Some instructive boundary agreements are given in full. In the exchange of notes accompanying the Treaty of Friendship between the United Kingdom and Hejaz many will read with interest about the refusal of the British Government to renounce the right of manumitting foreign slaves and repatriating them to their country of origin and its resolution to continue " to carry out a duty which they owe to humanity."

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[1] *Principles of Roman Law.* By Fritz Schulz. Translated from a text revised and enlarged by the Author, by Marguerite Wolff. (London: Humphrey Milford, Oxford University Press, 1936.) Pp. xvi + 268. 12*s.* 6*d.*

[2] *British and Foreign State Papers.* (With which is incorporated *Hertslet's Commercial Treaties.*) 1931, vol. cxxxiv. Compiled and edited in the Librarian's Department of the Foreign Office. (London; H.M. Stationery Office. 1936.) Pp. xvii + 1329. £1 15*s.*

About two-thirds of the volume are devoted to a selection of treaties concluded between foreign States. The guiding principles of the selection, *e.g.* the reason for devoting over sixty-five pages to a commercial treaty between Austria and Czechoslovakia and its elaborate schedules, are not quite clear to the reviewer. Practically all these treaties are printed in the League of Nations Treaty Series, and it ought perhaps to be a matter for consideration whether use ought not to be made in the future of that Series for the purpose of printing the treaties in question in English instead of in French. The fact that these treaties are available in the Series published by the League of Nations may also be regarded as relevant for considering a further change which we venture to urge, namely, the return to the former policy of including diplomatic correspondence, in particular such as has not been published before. That correspondence constituted a prominent feature of the volumes of the British and Foreign State Papers published in the nineteenth century, and its publication was highly valued by students. Finally, it would be an advantage if a volume of this nature could include all arbitral awards rendered during the period under review with the exception of the awards of mixed commissions. The Clipperton Island award is not the only or most important arbitral pronouncement during that period. H. L.

EXECUTION OF AWARDS IN INTERNATIONAL DISPUTES.

THIS is a careful discussion [1] of the law and practice for the execution of decisions and awards in international disputes, disputes, that is, between States; the question of the enforcement of the decisions of courts in matters of private international law does not fall within the scope of the book. The usefulness of the book is increased by the addition, not so usual in French books as to be unworthy of notice, of an index of subject-matter.

The main difficulty with which the author has had to contend is the paucity of authority on the subject-matter. There is, indeed, an abundance, perhaps even a superabundance, of what our French-speaking friends call *doctrine*, an abundance perhaps not fully exhausted even by the copious bibliography attached to this book, but the cases in which a State has refused squarely to recognize the award of an arbitrator or the decision of an international tribunal are not numerous. The author gives a list of nineteen cases of non-execution beginning in 1816, but the greater part of these turn out on examination to be instances of a non-execution not resulting from a refusal by the State which has lost its case to recognize the binding character of the decision. Thus payment by Germany of the damages awarded by the Permanent Court of International Justice in the affair of *The Wimbledon* was prevented, as the author himself reminds us, not by German action but by a decision of the Reparation Commission insisting on the prior right of reparation payments. And in the famous affair of the "Optants" Roumania in effect refused to submit the matter to arbitration or judicial decision, not to execute an unfavourable award. There is thus little *authority* in the sense of precedents, whether legal or diplomatic, to throw light on the situation which results when the State defeated in the legal conflict claims that for some reason—usually that the tribunal has exceeded its powers—the decision is null and void.

The discussion of the problem led Dr. Hambro to cover a wide field—the rights of the victorious party under the League Covenant, how far forcible remedies are admissible under the Pact of Paris and even under the abortive Treaty of Mutual Assistance and the Geneva Protocol—all these matters are carefully examined; but perhaps all the time the author and the reader have a certain sentiment, conscious or subconscious, that the discussion is a little remote from present realities. The author is a partisan of the doctrine that at all costs, even, unless we misunderstand him, at the cost of war, a legal international decision ought to be enforced. This is a doctrine which depends for its validity on the assumption that at some point legal processes result in a decision which is and ought to be unimpeachable. This assumption is at the present time, when all, or almost all, international decisions are the work of the Permanent Court of International Arbitration or of the Permanent Court of International

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[1] *L'Exécution des Sentences Internationales.* Eduard Hambro. (Paris: Recueil Sirey, 1936.) Pp. 148. Frs. 40.

Justice, so likely to be true that as a working formula it is fairly acceptable; but even so it is asking much to expect those who see peace as the condition precedent of justice to allow the legitimacy of a resort to war by a State successful in litigation. Pressure by the international community as a whole is a different matter; if and when that community is sufficiently well organized and well disposed to enforce international opinion by irresistible pressure—economic or even, in the last resort, military—the chance that an individual State will defy the public opinion and public force of the world will be small.

J. F. W.

COLLECTIVE SECURITY.

It is remarkable that at a time when all the great States are rearming in larger measure than ever before, and when the Covenant of the League is regarded with pity or with contempt, there was never such earnest study of international co-operation and of the principles and practice of collective security. This book [1] of over five hundred closely printed pages is a record of the seventh and eighth International Studies Conferences which were held in Paris and in London in 1934 and 1935, and were devoted to those subjects. It is prepared by the International Institute of Intellectual Co-operation, the executive body of the League organization for that object. The International Studies Conference is the outcome of an effort to bring about co-ordination of the institutions in the different countries devoted to the scientific study of international relations. It meets annually, and the members, who are representatives of a number of national and international institutions, present reports on the different aspects of the problem which has been scientifically divided up. So in this case the question of collective security is examined from the point of view of fundamental principles, the prevention of war, peaceful settlement of international disputes, disarmament, material and moral; sanctions and measures of mutual assistance, regional agreements, neutrality, etc. The book contains some of the addresses delivered at the Conference in full, and large extracts from the memoranda and discussion at the Conference, together with a final report. One might hope that the report would present the collective wisdom on collective security; but that is not its purpose. There is no attempt to sum up the general opinion, but only to summarize what actually took place. While for the student, then, this collection of national and international research is of value, for the statesman who wants guidance in action it will not be much help. In the multitude of counsellors there is more confusion than guidance. The conclusion of the report is—" An activity like ours does not produce immediately any concrete result. No convention will issue directly from our labours. But in the realm of the imponderables their effect may be salutary. Our deliberations have not only brought us closer together by making us understand one another better: they have left seeds which will develop, doubts which we will want to clear up, new conceptions which will take definite form in our minds." But the professors and publicists will, it is hoped, be able to extract out of this abundant material something a little more positive.

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[1] *Collective Security*. Edited by Maurice Bourquin. (Paris: International Institute of Intellectual Co-operation, 1936.) Pp. xi + 514. 16*s*.

NORMAN BENTWICH.

THE LEAGUE OF NATIONS AND THE RULE OF LAW.[1]

THE scheme of this book falls into three parts. Under the heading of "The Pre-war System" we are given a rather slight sketch of the working of diplomacy in the later nineteenth century and the beginning of the twentieth. Part II, which is entitled "The Elements of the Covenant," is more closely written, and is chiefly concerned with the various drafts which were discussed at Paris in 1919. Here the learned author is taking us over well-trodden ground, but many readers will be grateful for the freshness and vigour with which he has treated a subject that easily becomes tedious. In the third part, which deals with "The Working of the League," Sir Alfred is at his best. Here we are given abundant evidence of his intimate familiarity, both with the procedure and with the atmosphere of Geneva. The possibilities and the limitations of League action are here presented with a realism which cannot fail to impress.

A lawyer reviewing this work in a legal journal is naturally disposed to concentrate his attention upon those parts of the book which are of legal interest, and the second part of the author's title seems to invite this emphasis. But the title is misleading, for the book has very little to do with law, and the little that there is would have been better omitted. International Law forms the subject of a short chapter of eight pages in Part I, and we are told that the term "embodies a conception which is, at its best, confusing and, at its worst, exasperating" (p. 94). A few pages later we are informed that "international law, when its contents are analysed, turns out to be little more than a decorous name for the convenience of the Chancelleries" (p. 99). If international law is really such a fraud as this, then it is obvious that there can be no "rule of law" between states, and the second part of the title of this book becomes superfluous. "Why then," the author asks himself, "has it come to exercise any influence at all? Put in a sentence, the explanation is that, since thought, like Nature, abhors a vacuum, men found in the conception of 'Natural Law,' of which the international lawyers made use, a substitute for the Christian Law of the Middle Ages and for the Roman and Stoic Universalism which preceded it." Writing of this kind is quite unworthy of the author.

In his preface Sir Alfred Zimmern says: "I have limited the footnote references to works likely to be of help in a further study of the subject." That being so, it is remarkable to find that the chapter on international law makes no reference to any one of the standard textbooks. Evidently they are not regarded as being "likely to be of help," and perhaps this may explain why the learned author's occasional references to matters of international law are so inaccurate as to suggest very superficial study. Thus we are told that the Geneva Arbitration of 1871 arose "out of the privateering activities of the *Alabama* and other vessels" (p. 109). The slight references to the Hague Conventions and to the Declaration of London are highly misleading, while certain problems of international law, which have proved to be of high importance in the period under review, are passed over in silence.

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[1] *The League of Nations and the Rule of Law.* By Sir Alfred Zimmern. (London: Macmillan & Co., 1936.) Pp. xi + 527. 12*s*. 6*d*.

These criticisms all relate to Part I of the book. Here the author gives the general impression of being on unfamiliar ground. For example, "Sea Power" is made the subject of a separate chapter, but the chapter consists only of two pages, which contribute nothing to the understanding of the problem. Four pages have been deemed sufficient for the chapter headed "Treaties of Guarantee," a question which lies at the root of the whole problem of security.

Of the vast number of books which have been written about the League of Nations the majority have quickly passed into deserved oblivion. Sir Alfred Zimmern has put such good work into the second and third parts of the book now under review that his analysis of the League is likely to be of permanent value. If, as is likely, his book goes into later editions, his own reputation will be best served by omitting the short and sketchy chapters which constitute Part I.

H. A. S.

ALGERIA—PAST AND PRESENT.

M. Maunier is well known as a student and a writer, and this little volume[1] in which he has collected studies of North African law and custom is welcome. His scholarship and his personal acquaintance with the people of Egypt and of the French North African littoral are adequate guarantees that what he writes will be worthy of attention and respect. The studies are linked together, as he says, by the subject of which they treat—namely, the Man of Algeria, and by the attitude of mind from which the subject is approached, that of a student of society seeking to understand the legal traditions of those with whom he is brought into contact.

The first essay deals with Family Law, the second and far the longest with Contract Law, and the last three are studies in the relation of European (French) and native law, and in the general problems of legal administration in North Africa. Of the three sections, that dealing with Contract Law is the most suggestive. Here, M. Maunier is mainly occupied with the customary rules governing the *Maouna*, the *Taoussa*, and the *Touiza*, among the Kabail. Each of these is, in principle, a method by which economic assistance is secured on a basis apparently voluntary, but in which a strict customary obligation upon the recipient of the favour to make an appropriate return is to be found embedded. M. Maunier deals at greatest length with the Taoussa. This consists of contributions in money made by the guests at a feast, and which the amphitryon is bound to return to the respective donors, when the appropriate and similar occasion occurs. And it is a point of honour that the counter gift should exceed the original. The custom is discussed by M. Maunier in all its connexions, economic, social and religious. He makes the interesting suggestion that these forms of customary obligation represent the early gropings of a community governed by tradition towards the economic methods of a society based on contract. In the *taoussa* we may dimly see a form of loan upon interest.

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[1] *Coutumes Algériennes.* By René Maunier. (Paris: Loviton & Cie., 1935.) Pp. 202.

In several places M. Maunier insists on the democratic character of Berber, and in particular Kabailian society. This insistence may justify our bringing his essay into juxtaposition with one upon a very different subject sent for review.[1] There is little in Dr. Höslinger's pamphlet which concerns matters within the scope of our Society ; though much that may claim the attention of those interested in ecclesiastical history. Dr. Höslinger seeks to determine the part played by the Roman, Punic, and Berber influences in the early Church in North Africa. His discussion of the organization and of the rigorous spirit of the African Church is illuminating. But in this place we can only take note of the fact that he, like M. Maunier, insists upon the democratic independency of the Berbers in relation at that time to doctrine and to Church organization. Their religious particularism has been, indeed, noted before. Montanism, Manicheeism, Donatism, Pelagianism flourished. In many a small community several congregations existed side by side, each with its presiding "bishop." Dr. Höslinger compares the sectional character of religious life in England, where in many a small town several separate Christian congregations exist each with its presiding priest or pastor.

Returning to M. Maunier's book, attention may be drawn, in conclusion, to his references to the modes of treatment of Moslem law adopted by the French in Algeria. In an effort of adaptation the principle of selection among the doctrines of the four schools was followed by the *Code Morand* in 1905. The same principle has also at times been used by the courts. This use M. Maunier considers as of doubtful validity. He rightly regards as contestable the argument that because a Moslem has traditionally a right to choose his own "rite," a French court in Algeria can impose upon Moslems rules selected from whichever "rite" the Tribunal prefers.

F. M. G.

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[1] *Die alte afrikanische Kirche.* By Robert Höslinger. (Vienna : Verlag Augustinus-Druckerei, 1935.) Pp. 77. R.M. 5.20.

We have also to acknowledge [1]:

The King and the Imperial Crown. By Professor A. Berriedale Keith. (London: Longmans, Green & Co., Ltd.) Pp. xiv + 491. 21*s.*

The Law. By the Rt. Hon. Sir Henry Slesser. (London: Longmans, Green & Co., Ltd.) Pp. xix + 192. 3*s.* 6*d.*

Diplomatic Correspondence of the United States; Inter-American Affairs, 1831–1860. Vol. VII, Great Britain. (Washington: Carnegie Endowment for International Peace.) Pp. xxxi + 785. $5.

Juridical Bases of Diplomatic Immunity. By Montell Ogden. (Washington: John Byrne & Co.) Pp. xx + 254. $4.

Cabinet Government. By W. Ivor Jennings. (London: Cambridge University Press.) Pp. xii + 484. 21*s.*

The Gold Clause. Vol. II, Second Edition. By Dr. jur. Arpad Plesch. (London: Stevens & Sons.) Pp. vii + 106. 7*s.* 6*d.*

A Hundred Years of English Government. By K. B. Smellie. (London: Duckworth & Co., Ltd.) Pp. 468. 15*s.*

Sociologie Coloniale. By Professor René Maunier. (Paris: Les Editions Domat-Mont Chrestien.) Pp. 442.

Internationale Idealvereine. By Dr. jur. Paul Schrag. (Berne: Paul Haupt.) Pp. 221. S. frs. 8.

La Rappresentanza nel Diritto Internazionale. By Angelo Pieri Sereni. (Padova: Cedam.) Pp. xvi + 455. L. 50.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bombay Law Journal; Bombay Law Reporter; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin Mensuel de la Société de Législation Comparée; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Headway; Hindustan Review; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal de Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Revista de Ciencia Juridicas y Sociales; Revista de Derecho jurisprudentia; Revista de Identificacion y Ciencas penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; South African Law Journal; Studi di Diritto Industriale; Tulane Law Review; Wisconsin Law Review; Zeitschrift für Ostrecht.

[1] Mention here does not preclude a review later.

A COMPARISON OF HUNGARIAN CUSTOMARY LAW WITH ENGLISH CASE LAW.[1]

[*Contributed by* PROFESSOR CHARLES SZLADITS, *Peter Pázmány University, Budapest.*]

HE who undertakes to draw a parallel between English and Hungarian law may suitably begin his task by quoting at the very outset Virgil's " *si parva licet componere magnis.*" For English law is one of the world's great law systems, rivalling with Roman law in its range, whilst Hungarian law was never of more than local consequence. But even so, I trust, English jurists will be interested to observe how many features the legal traditions of a continental nation have in common with the proud edifice of English law. This similarity was more particularly noticeable up to the year 1848, but it can still be seen in many points in the present day.

Both Systems are Non-codified.—The principal common feature is that both systems are of the non-codified order. The rules of Hungarian law are divided into two main groups, like those of English law. Just as Statute Law and Common Law face each other in English law, Statute and Custom in Hungarian law form two legal systems of equally binding force, Custom indeed being, at least in the territory of private law, of dominating importance. A peculiar trait in our system is that our customary law was transformed into written law at the beginning of the sixteenth century. Up to the end of the fifteenth century Hungarian law was unwritten to such an extent that written remains thereof, left to us, are very scarce. There were neither records nor year-books.

The insecurity of unwritten law induced King Vladislav II to commission a judge of high standing, Stephen Werböczi, the so-called " Protonotarius Judicis Curiæ Regiæ," to reduce the laws and customs of the Kingdom (*jura et consuetudines regni*) into writing. The Judex Curiæ Regiæ was a dignitary of similar rank to the Lord Chancellor, his Protonotarius may be said to occupy an office resembling that of the Master of the Rolls. Werböczi carried out the task thus set him in a scientific and systematic manner and submitted his work to the King in the year 1514 under the name "*Opus Tripartitum juris consuetudinarii inclyti Regni Hungariæ.*" The work of Werböczi was intended to be enacted as a code, and the Estates requested the King to sanction it as written laws of the country (*jura regni scripta*). Political troubles, however, prevented this, but Werböczi had his work printed in 1517, and the courts, founding their judgments on it, accepted it as an authentic summary of customary law. In this way, the Tripartitum is at once both written law and custom: written law in form, custom in respect to the authority which gives it binding force. We call this amphibious sort of law *written custom.* Thus the Tripartitum was, so to say, "arrested" law, yet it was more dominating than any law book, it was the very Palladium of the nation. The Tripartitum rose to an importance in Hungary such as no "book of authority" ever attained in England. We are justified in saying that the Tripartitum, as such, embodied—for a long period—the *whole* of Hungarian Common law. To realize the situation better, imagine that Littleton, whose book appeared thirty-two years prior to Werböczi's work, had compiled the whole Common law, that all earlier law sources had sunk into oblivion and that after him no reports, no books of authority, had appeared during the next 250 years. This will give you an idea of Werböczi's place in Hungarian law.

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[1] A lecture delivered by the author at the London School of Economics, on March 9, 1937.

I hardly think there ever was a law book so popular as Werböczi's Tripartitum. Up to 1848, every country squire knew his Werböczi almost by heart. Not in vain were the Hungarian nobility and gentry called the "populus Werböczianus": it was Werböczi who first established their privileges, the most popular of which was their total exemption from all sorts of taxes and tolls.

The beautiful suspension bridge across the Danube at Budapest, planned by an English engineer, Adam Clark, is memorable not only as a work of art but also as a landmark in the history of privileges. For this was the first crossing at which the Hungarian nobleman had to pay a toll of two farthings. This atrocious imposition provoked a storm of indignation among the nobility, whose "virgin shoulders" never until then had sustained any tax or duty. It was in defence of this toll that our great reformer, Count Stephen Széchenyi, wrote his famous book, *Taxes and Two Farthings*, a thundering letter of indictment against the privileges of the nobility which was soon followed by their abolition in 1848.

To return, now, to the sources of Hungarian law.

Both constituent parts of Hungarian law (Statute law as also Customary law) were formerly included in the "*Corpus Juris Hungarici*," which is even to-day a living source of Hungarian law. This work comprises (in the edition of 1779) in the first place Werböczi's Tripartitum, followed by the Statutes promulgated in the form of Royal Decrees, ranging from the times of St. Stephen, our first king (1000–38) down to Maria Theresa (1740–80).

Resemblance between Customary Law and Common Law.—The resemblance between Hungarian Customary law as compiled by Werböczi and English Common law at once strikes the eye. The greatest living Hungarian jurist, Professor Benjamin Grosschmid, published in 1928, at the age of 77, a book entitled *Werböczi and English Law*, in which he drew a detailed parallel between the former Hungarian law, *i.e.* before 1848, and the legal institutions of England before the recent land legislation. This book exhibits a profound understanding of the spirit of English law and, if made accessible by a good translation, would arouse great interest in England. Professor Grosschmid finds the resemblance of the two legal systems consists not so much in the contents and merits of their institutions, but rather in what he calls "the style, modelling, husbandry and system of legal institutions." The parallels are particularly striking in the law of real property. The basic principle of Hungarian law until 1848 was also the paramount ownership of the Holy Crown, the system of enfeoffment by the King, the two kinds of "escheat": *devolutio ex defectu seminis* and *ex nota infidelitatis* (corresponding to the English forms of escheat *propter defectum sanguinis* and *propter delictum tenentis*). Under Hungarian law again the order of succession in real estate differed from that in the case of personalty. These common features can be followed up to their minutest details. Thus in Hungarian law also we find the class of "chattels real": we observe that the widow of a nobleman took a child's share in the personalty, that a mortgage was treated as a movable (mortgage in possession being the only form of mortgage known in early Hungarian law). There existed also a parallel in respect to the base-fee in Hungarian law: the original grantee of the feoffment was entitled without restriction to transfer the same to anybody he chose, but the transferee and his legal successors could keep it only until such time as the case of *devolutio* (escheat) took place in the family of the original grantee. The parallel can be traced down to the very nomenclature: English law, for instance, speaks of "*hereditaments*," Hungarian law spoke of *hereditas*; the term corresponding to the English "estate" is *jus possessionarium*; instead of conveyance we find *fassio perennalis* and so on. Professor Grosschmid attributes this similarity to the "common mediæval seed" out of which legal institutions throughout Christian Europe have sprung.

Judicial Origin.—Another feature common to both Hungarian and English law is the judicial origin of each. The Tripartitum was, indeed, the work of but one man; but its source was to be found in the law-developing powers of the Hungarian judges. Werböczi tells us that the custom of the realm, "*municipalis consuetudo*" (and, note, that in England also the domestic law is spoken of as "municipal" when contrasted to foreign law) originated in the judgments of our Superior Judges. These being repeatedly followed, there gradually grew up a body of judicial custom. The Superior Judges in Hungary (*Judices Regni Ordinarii*) were the Palatinus, the highest dignitary next to the king; the Judex Curiæ (the Lord Chancellor) and the Personalis, whose full title was "*Personalis Presentiæ Regiæ in Judiciis Locumtenens*," President of the Tabula Regia (the King's Bench) and as such corresponding to the English Lord Chief Justice. It was the courts of these judges which gave binding force to Werböczi's work.

Then again, after the lapse of 250 years we come across another important source of law which is exclusively a judicial creation. This is the so-called *Planum Tabulare*, a collection of decisions in the main given by the Supreme Court. The *Curia Regia* was reorganized as the High Court in the years 1715 and 1723. It consisted of two Tables (Divisions): the *Tabula Septemviralis* as Court of Appeal, so called because originally seven members sat on it, that is, three Lords Spiritual and three Lords Temporal, presided over by the Judex Curiæ, and the *Tabula Regia* as court of first instance, presided over by the Personalis. Their great importance is emphasized by the fact that the Judex Curiæ was the President of the Upper House and the Personalis the President of the Lower Table of the Diet or Parliament.

The decisions of the Royal Curia given during the first fifty years after its reconstruction were brought together to form a systematic collection by order of the "King," Maria Theresa, in 1769. This collection is the "*Planum Tabulare sive Decisiones Curiales*." It contains 990 decisions on questions of principle (leading cases) and may be justly considered to give a true reflection of the entire legal life of the time. Custom accepted it as binding.

I ought to point out in passing that we give the title of King to the reigning Queen also, the official name of Maria Theresa thus being "*Maria secunda, Rex Hungariæ.*" Hence the shout of allegiance at the Diet of 1741 "*Vitam et sanguinem pro Rege nostro Maria Theresa!*" to which I beg leave to add the following quaint episode: Later on, when the War Council of the Court in Vienna (the Hofkriegsrat) requested from the Counties or Comitates the delivery of oats for the newly created regiments of hussars, the Counties refused this subsidy which had not been voted by the Diet. When reproached by the War Council, which pointed out that they had already offered life and blood to the King, they answered: "*Vitam et sanguinem*, certainly, *sed avenam non*"—but not oats!

It is highly to be regretted that no separate body of Equity, that wonderful creation of English legal genius, has been evolved in Hungary. The Curia—as well as the Common law courts—had no right to enlarge or remodel the rigid system of the Tripartitum by new legal remedies. The office of the Judex Curiæ—who might have taken the place of the English Lord Chancellor—soon became separated from the Royal Cancellaria (Chancery) and developed into an independent court. On the other hand, the Cancellaria—in view of the powers of the Superior Judges—could exercise but little influence over the dispensation of justice. Judicial orders, "*mandata judiciaria,*" the Hungarian equivalent for Writs, were issued by the Superior Judges. The King very exceptionally caused such mandates to be issued in his Chancery, and even in such cases the further proceedings fell into the jurisdiction of the ordinary courts (*e.g.* in the case of a "*mandatum novi cum gratia,*" *i.e.* restitution by pardon).

The Common law was saved from fossilization only by Equity. Since we had to do without this regenerating force, our Feudal law, unable to keep pace with time, became antiquated when confronted with modern ideas and could not withstand the onslaught of the liberal opposition in Hungary. The national uprising of 1848 gave the country a modern parliamentary government resembling in many points the Belgian Constitution, at the price, however, of the regrettable sacrifice of many venerable Hungarian institutions. The legislation of 1848 abrogated with one stroke of the pen the system of feoffment, of entail and of socage, those fundamental institutions of real property. This, transported into English legal conception, amounts to the same as if English legislation in 1925 had enacted the abrogation of all laws relating to real property. Deprived of its fundamental supporting pillars, the entire edifice of Hungarian law collapsed, so to speak. A modern Hungarian legal system might have been built up in the same style from the ruins and, indeed, the first parliamentary government was commissioned by the law of 1848 to codify Hungarian Private law, but Austrian absolutism came, and imposed the Austrian Civil Code upon us. Now, please, try to imagine a foreign conquering Power imposing upon England its own codification.

Provisional Rules of 1861.—This state of affairs lasted only eight years, *i.e.* until 1861, in which year judicial autonomy was restored to the country. Hungarian courts took up their duties once more, but they were at a loss to know what law to apply. There was no crowned king, nor was there a legislature which could make good the deficiencies by the creation of new laws. Once more it was the High Court which led the country out of her difficulties. To this end, a special conference was convoked, composed of the members of the Royal Curia and of other jurists of note, presided over by the Judex Curiæ and, therefore, known as the "*Conference of the Judex Curiæ.*" This conference drew up a framework of rules under the name of "*Provisional Rules of Jurisdiction*" which, in principle, restored the Hungarian laws, but also filled in the gaps made in 1848 and thus facilitated the transition from Austrian to Hungarian law. Thus, amongst other things, the Conference, availing itself of the basic principles of old Hungarian law, reconstructed, in modern shape, the ancient institutions of Hungarian matrimonial property law and inheritance law. In this way the Conference reconstructed the separate property of married women, already fully recognized in Werböczi's Tripartitum, more than three and a half centuries before the English Married Women's Property Act; the community of acquired goods between husband and wife belonging to the working classes; the widow's usufruct, which we find as far back as in St. Stephen's law, and the reversion of inherited property to the lineage it descended from, a principle preventing dispersion of the inherited family estate. These ancient institutions still confer the stamp of national individuality upon our law.

The Provisional Rules of 1861 were originally intended to be enacted as a statute, but since the legislative machine was not working, they were accepted by the Plenary Session of the Royal

Curia as regulative, pending subsequent legislative measures. In this way these Rules also grew into written customary law: a further instance of an "arrested" code, put into force by custom. And, illustrating the French adage that—"nothing is so permanent as the transitory," it is not surprising to find that these Provisional Rules of Jurisdiction still obtain after seventy-five years and are the very foundation of our law to-day.

Real Property.—In the domain of real property, however, Austrian law to a large extent continued to prevail, maintained by the Provisional Rules. The best part of Austrian legislation, incorporated in Hungarian law, is its highly elaborate institution of the Land Register, which still survives in our legal system. The entry of the right of property in the Land Register took the place of the former Hungarian conveyance (the so-called "*fassio*"); the mortgage in possession was replaced by the entry in the Land Register of the right of *hypothec*. Yet, in spite of its outstanding merits, highly praised by Sir Charles Fortescue Brickdale, this system of land registration has, owing to the discrepancy existing in it between paper form and facts, remained foreign to the mentality of the Hungarian people, whose sense of reality still labours under great difficulty in assimilating it. In order to explain this system to my students I generally start with *Alice in Wonderland*, because I have realized that it is impossible to understand the intricacies of an entry in the Land Register without reference to the Cheshire Cat. You remember that the cat would sometimes disappear but the grin would remain. Then the cat again began appearing behind the grin. Now, here you have the system of Land Register entries in a nutshell. The cat stands for the reality of rights in the property, *i.e.* landed interests; the grin stands for the entry of these rights in the Land Register, *i.e.* the outside appearance of the right which modern German jurisprudence calls "*Rechtsschein.*" These two, however, reality of right and entry of it in the land register, do not always coincide. Thus, a person may acquire property in an immovable by prescription irrespective of the Land Register, and then all that remains of the former ownership in the Land Register will be the mere grin. Or, to give another instance: the debtor satisfies the right of mortgage, without expunction of the entry made in respect of the same: the cat has disappeared, but the grin is still there. Or it may happen contrariwise: as if it should happen that an entry of the right of ownership has been made in somebody's favour in pursuance of an invalid title; he does not hereby acquire the cat (the right of ownership itself), but only the grin. Yet, even so, this grin may materialize in the course of time into the cat, so, if a *bona fide* purchaser acquires the immovable from the spurious proprietor, or if somebody purchases the right of mortgage from the satisfied creditor, then the cat appears from behind the grin. By these means, my students soon come to recognize and appreciate the significance of the disjunction and the reunion of the cat and the grin which is the very essence of the Land Register. Experience has taught me that there lurks sometimes more wisdom behind a nursery tale than in bulky scientific books.

Our courts did their best to make the rigid conceptions of the institution of Land Registration conformable to the more realistic Hungarian outlook. Although the Hungarian judge could not create Equity in the English sense of the word, he could create equitable law to serve as a substitute for Equity. If somebody sold his immovable property twice, giving delivery to the first purchaser and causing entry of the right of ownership to be made in favour of the second, under the Land Register system that purchaser became the proprietor in whose favour the entry was made, even though the first purchaser had already taken possession of the immovable. Such cases were very frequent (owing rather to difficulties in the working of the system than to fraud). In this state of things the Hungarian judges enforced the equitable principle expressed in English law by the conception of Notice. According to our court practice a former purchaser can enforce his right also against a subsequent purchaser inscribed in the Land Register, if the latter knew of such former purchase or might have known of it had he taken the care which a man of common prudence is expected to take in his own concerns. More than that, Hungarian judges will always presume notice where the first purchaser has entered into possession, assuming that nobody will purchase an immovable without previous inspection, just as nobody will buy a pig in a poke. Had he inspected it, he would have found that another was in possession, and if he had not made an inspection of it, he was negligent and must, on this very ground, yield to the first purchaser.

The legislation of 1848, the ensuing—though relatively short—dominion of Austrian law and its lasting influence upon our law of real property, caused a breach in the continuity of our legal system from which we still suffer. Until 1848 Hungarian, like English law, shows but scarce and indistinct traces of the influence of Roman law. Up to that time, our legal history follows the same unbroken development as English law. Through the influence of Austrian institutions and doctrine, the spirit of Roman-German law systems begins to penetrate, considerably altering the original character of our private law. In the course of years, however, the courts succeeded in developing a sort of compromise between the national Hungarian legal thought and "Pandectic" legal conceptions from which issued a synthesis of a very special character.

The Development of Hungarian Law.—The framework of the "Provisional Rules of Jurisdiction" was filled in by court practice with a rich content made accessible in the course of seventy-five years by the Reports of Decisions, amounting to several hundred volumes. The sudden change from feudal agricultural society to industrial democracy gave rise to an urgent demand for the development of the law of contracts and torts. It was again our courts who had to meet this demand. The strenuous work of the courts has piled up an astonishing mass of detailed rules, and many new legal institutions have taken shape in court practice before the eyes of my own generation. Such, for instance, is the liability for accidents falling upon the owner of dangerous works and establishments. This liability has been developed by the courts on the analogy of the Statute on the Liability of Railways of 1874, so radically indeed that legislation has been required to regulate Employers' Liability Insurance in order to lighten the burdens of factory owners. On the other hand, court practice succeeded in evolving an elaborate system for the protection of immaterial goods and moral interests, safeguarding the inviolability of a man's personal concerns. To give you only one instance, I may mention the following case in point. A well-known Hungarian painter, Vaszary, was commissioned by a certain town to paint the portrait of the late Prince Primate, one of the prominent sons of the said town. The town council, however, decided that the picture exhibited in the town hall was not quite true to life, and had it touched up by some itinerant painter whose name could not even be traced. The aldermen were now very content with the likeness, but the artist, horrified by the disfigurement of his work, brought an action for moral damages against the town council on the ground that his renown as an artist was seriously jeopardized by this proceeding. The Curia found that the town council was liable to make amends for the injury. This decision became a leading case for the so-called right of individuality, or personality, of an author, as a counterpart of his copyright.

In the same way did our courts master the difficulties arising from the economic crisis following the Great War, namely, the problem of the so-called economic impossibility of performance, the French *imprévision*, as also the problem of revaluation which became prominent in the wake of the depreciation of money. For years government and legislation stuck to the fiction that one paper crown is equal to one gold crown, even at a time when the value of the former sank to one fourteen-thousandth part of the gold parity. Consequently in 1923 a debtor could repay his debt of 3,000 pre-war crowns (about £120) with the price of a tram ticket. Against this fiction the courts enforced, as best they could, the principle of equivalence and equitable balance and thereby saved economic life from utter chaos.

Following the present-day evolutionary trend towards the mitigation of the rigidities of strict law, Hungarian court practice has developed a series of equitable rules which may be considered as counterparts of Equity principles in English law. This court practice has introduced into our customary law the reduction of contractual penalties and relief against forfeitures. So also the courts have begun to take account of the use of undue influence—largely moved thereto by English doctrine, although the presumptions which give to this doctrine its special character are not employed. You will also find in Hungarian case law relief against accident, *e.g.* in the case of the loss or destruction of a will. And there are instances of the principle that " Equity does not allow a Statute to be made an instrument of fraud." All this does not mean that we have anything comparable with English Equity; certainly we have not, seeing that the two main institutions of Equity, Trusts and Injunctions, are hardly represented in Hungarian law. But what has been said will give an idea of the great constructive power of our court practice.

Case Law.—Thus, Hungarian law is, like English law, indebted for the greater part of its substance to development by the judges. I must, however, emphasize a fundamental difference between the two systems, viz. that in Hungary precedents are not generally binding upon the courts. Hungarian law does not recognize one isolated judicial decision as law; it does so only after the decision has grown into Custom law, that is, after general conviction has adopted it as law. It is indeed difficult to draw the line between court practice thus established and court practice not yet crystallized into general conviction. The fact is that to-day the judge is the mouthpiece of public legal opinion. This is easy to understand by using the simile of the radio. The judge, like a very sensitive antenna, receives the waves of the enactments of public legal opinion emanating from all the inter-relations of social life and vibrating around him, and he transforms them into sounds. And this is the reason why it is so difficult to draw the line between Custom law and court practice. In general it would be correct to say that court practice to-day is identical with general Custom law (local and occupational Custom law excepted).

It is, on principle, not unlawful for the Hungarian judge to depart from earlier decisions. That is to say that Hungarian law is characterized by elasticity, with all its drawbacks and advantages.

English case law may be likened to the formation of a coral island, while our Hungarian custom gives more the impression of the condensation of a cloud. There were many complaints in the second half of the last century by reason of the fluctuating court practice; this, however, was in subsequent times very effectually counterbalanced by the institution of the *Official Collection of Prejudicial Decisions*. When the Royal Curia considers a decision to be of importance on principle it records it in this Collection, and thereupon the principle of law therein expressed becomes binding upon all the Divisions, or, in Hungarian legal parlance, Senates, of the Royal Curia. The principle of law must be an inference from the whole contents of the decision, as is the case with precedents in England; the abstract of the decision printed as headlines above it, although officially drawn up, is not binding. If the Royal Curia finds it necessary to depart from a decision on principle, or where the possibility arises of the development of a practice inconsistent with a recognized principle, the so-called Senate for the Unity of Law, consisting of eleven judges of the Royal Curia, passes a so-called Decision of Uniformity. Such decisions are formulated not as an individual judgment but as a general rule, and are binding upon all courts. Such a Decision of Uniformity can be modified only by a Plenary Decision passed by a Plenary Session of all the Civil law Divisions (Senates) of the Royal Curia; and should there arise a need to modify a Plenary Decision this can be done only in a Plenary Session and by a majority of two-thirds of the votes. It is, however, quite exceptional for a Plenary or a Uniformity Decision of the Curia to be over-ruled by a new decision. This sort of decision can therefore fairly be assimilated to English precedents. Up to the present day 105 Plenary Decisions, 82

Uniformity Decisions and 782 decisions on principle have been published, the sum total of decisions contained in the collection amounting to the number of 969.

There are still jurists who say that even those decisions which are binding upon the lower courts are no true rules of law and that they grow into such only through being adopted into Custom law. This view, however, is over-nice. What is binding upon all judges must certainly be binding also upon all citizens. Moreover, we are aware of no case where public opinion in conflict with a decision of the Royal Curia of this kind has stood its ground. When Plenary Decision No. 63 declared that the mortmain laws had lost their binding force because they were antiquated, the legal writers, almost without exception, made a great outcry; yet the decision, none the less, still obtains after forty years. Reviewing the Decisions contained in the Official Collection in the light of practical experience, we find that these as well as established court practice stand in all circumstances in the place of rules of law so long as the Royal Curia allows them to remain unchanged.

Rules of Law.—Another much-vexed question for Hungarian as also English theorists is, whether the Curia, when pronouncing a new principle of law, does thereby create a new Rule of Law, or whether the court only expounds a Rule of Law already existing. With us the latter opinion prevails, generally speaking. Whether this is more of a fiction than of reality, gives rise to the same controversy as in England. I prefer not to discuss the subject here and will only say that in my opinion a judge in developing law can never contradict statute or inveterate custom. This is a definite limit to the judge's power. And the rule that the Royal Curia must apply a Plenary Decision or a Uniformity Decision with retroactive force in the very case in connexion with which the Decision has been given, also proves that the Decision does not create new law but only lays down the existing law.

A change in court practice is, as a rule, brought to pass gradually and by almost imperceptible deflections from existing rules. There are, however, also cases of sudden changes. Thus it was an established practice for forty years that the board of directors of a joint stock company was entitled without special decision passed by the general meeting to allot remunerations in favour of those of its members who rendered any special service to the company outside the scope of their regular activities. In opposition to this practice Decision on principle No. 844 laid down the rule that the board was not entitled to allot any remuneration to its members unless so authorized by the Articles of Association or by the general meeting. A change so sudden is always a shock to public opinion, and even the courts are reluctant to apply the new principle retroactively.

Thus, even in our system of prejudicial decisions, there is an element of uncertainty, not always the "glorious uncertainty" invoked by Lord Mansfield. The Hungarian judge does not like abstractions: his equitable and realistic sense is generally absorbed by the individual features of the case before him. He is very unwilling to depart from the just and equitable solution of the case in order to save a general principle. Therefore he is prone to accept the maxim now running in Germany: "*Gerechtigkeit geht vor Rechtssicherheit*," *i.e.* justice precedes certainty of law. For my part I rather share the view of Lord Eldon that "it is better that law should be certain than that every judge should speculate upon its improvement."

The Hungarian courts have done heroic work during the seventy-six years which have elapsed since the Conference of the Judex Curiæ. They had not only to develop case law but also to rebuild our whole system of law. In a state of extreme need they were compelled to assume the tasks of the legislator, which, of course, they could not fulfil in the systematic and detailed manner expected from the work of legislation. The call for codification was in Hungary all the more urgent than in other countries enjoying a system of developed case law.

Preparatory Work of Codification.—In fact, the preparatory work of codification kept abreast of the rich development of judge-made law. The first draft of the Code already ordered by the Diet of 1848 appeared in 1900. This draft code was strongly influenced by the German Civil Code, which was at that time the brightest star in Central Europe's legal firmament. This first draft was followed in the course of thirty years by a series of drafts, the last of which appeared in 1928. It is obvious that the draft code must have undergone an essential transformation during this period of thirty years. Legal practice has drawn much from the source of the draft codes published during the period, and particularly so for the purpose of filling up gaps in the law of contracts. The new draft code, on the other hand, endeavoured as far as possible to adopt and also to adapt the Customary law brought into being by the practice of the courts. This mutual approach of codification and Customary law has now developed so far as to justify us in calling the new draft code an improved compilation of the prevailing law. And this is again a triumphant result of the activities of the Hungarian judges in their efforts to develop law. We are faced with the same phenomenon now as in the times of the Tripartitum or of the Provisional Rules of Jurisdiction, when practice conferred legal force upon arrested work of codification. There are many jurists in Hungary as well as in England who oppose codification. They point out that we are in a happy situation, having a code and yet having none, or to be more exact, we have an " uncodified code " in the form of an official compilation which furnishes ample material to the judge for filling in the deficiencies of our legal system yet which does not bind his hands and so does not lessen the elasticity of the law. There are many on the other hand, and I confess that I range myself on their side, who hold that this is the very reason why such an unstable position cannot remedy the paramount disadvantage of our legal system, namely, the insecurity in law.

This much, however, is certain, that the power of the judge to evolve and develop law is a basic principle and pillar of our legal system, to which Hungarian public legal opinion steadfastly clings. The Draft Code gives ample opportunities for the exercise of this power in the future. Clause 6 of the Draft of 1928 (which follows Art. 1 of the Swiss Civil Code) lays down the following general principle: " In questions of law, where there is no definite legal rule, the judge must adjudicate in accordance with the spirit of the national law and approved legal doctrine and tradition." This is safeguard enough against cramping the development of law, even in the event of the Draft becoming operative law. The principle which Geldaard regards as one of the forces counterbalancing the drawbacks of a codification will still govern, namely, that " juridical decisions . . . will remain a means by which the law will develop, will continue capable of enriching the law by framing detailed rules."

The future of the Draft is at present uncertain. It may be that it will become superfluous, custom having absorbed most of its contents. On the other hand, it may be that the call for certainty of law will prevail and the Draft will be enacted as law. But in any case we may be certain that the power of the judge to develop law will continue and consequently the mental relationship of Hungarian legal development and the English law, by which we set so great a store, will remain.

THE INTERNATIONAL GOVERNMENT LOAN.

[*Contributed by* M. SCHMITTHOFF, LL.M., DR. JUR. *Barrister-at-Law.*]

THE question of the international government loan has been constantly before the international and municipal courts in the last decade. In 1929, the Permanent Court of International Justice was concerned with the *Case of the Serbian and Brazilian Loans.*[1] The Supreme Court of the United States had, in 1933, to consider the effect of the depreciation of the dollar on the gold obligations of the American Government.[2] In 1935, a Swedish court[3] and in 1936, a Norwegian court[4] had to decide cases bearing on loans issued by their respective governments. The Supreme Court of Austria pronounced in 1936 a judgment[5] in the case of the Austrian Loan issued under the auspices of the League of Nations. Recently, the House of Lords[6] in *The King* v. *International Trustee* added an important decision concerning an English governmental loan issued in America during the war. There has been another reason for the increased importance of the subject. The League of Nations has rapidly extended its activities in the domain of interstate finance. In pursuance of the reconstruction of Europe after the War, several state loans have been floated at the instance and under the auspices of the League.[7] Austria, Bulgaria, Estonia, Greece and Hungary have been among the states which issued loans in co-operation with the League. These loans are constantly supervised by the League Council, and in 1932, when some of the so-called

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[1] Publications of the Permanent Court of International Justice, Series A, Nos. 20–1 (Judgments Nos. 14 and 15).

[2] *Perry* v. *United States*, 294 U.S. 330.

[3] *Försäkringsaktiebolaget Skandia* v. *Riksgäldskontoret*, published in A. Plesch, *The Gold Clause*, vol. i, 2nd ed., at p. 66.

[4] *Insurance Companies Minerva and Viking and Stavanger Saving Bank* v. *The Norwegian Government*, published in A. Plesch, *The Gold Clause*, vol. ii, 2nd ed., at p. 91.

[5] Judgment of July 10, 1936, published in *Rechtsprechung*, 1936, No. 223, at p. 144.

[6] [1937] A.C. 500.

[7] *Cf.* Sir John Fischer Williams, "L'Entr'aide financière internationale," in *Académie de Droit International, Recueil des Cours*, 1924, IV, Tome 5 de la Collection, 1925, pp. 113–54.

League loans came into arrear, the Council has resolved that it realized "the special responsibility which lies upon the League in connexion with these loans," and has suggested certain remedies.[1] Recently, the League has extended its activities to a wider sphere. It has invited the Council to constitute a committee for the drafting of model provisions suitable for loan contracts concluded by governments and other public bodies and it has authorized this committee to co-operate with the International Institute at Rome for the Unification of Private Law.[2] The reason was that the general bonds and other instruments of these loans have often been drafted with such neglect of the rules of public and private international law that occasionally almost insoluble difficulties have ensued.[3] The British experts invited to serve on this Committee are Sir Otto Niemeyer and Professor Fachiri.[4]

In this paper it is intended to examine the general principles governing the international state loan as they have been developed by the courts and the practice in recent years. It will be submitted that the international government loan is a contract of a peculiar character which cannot be classified under any existing category and that that fact explains why the law governing this contract differs in many points from the general rules of law.

The Problem of Classification.—A remarkable feature of the international government loan is the inequality of status between the parties to the contract. The debtor is a foreign sovereign, the creditors are private persons. This disparity is peculiar to the usual form of the transaction, though it is not of the essence of the loan contract. It might well be that State A grants a loan to State B.

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[1] League of Nations, *Official Journal*, xiii, 2, 1932, No. 3136, at pp. 1926–7.

[2] Resolution No. 3 of the Assembly of the League of Nations adopted on September 28, 1935, published in League of Nations, *Official Journal*, Special Supplement, October 1935, No. 137, at p. 16. See also *Annotated Bibliography on Legal Questions concerning International Loans*. Publ. by the Library of the League of Nations, Miscell. Bibliographies, No. 8, 1937.

[3] In this connexion, mention should be made of the recent practice of embodying the institution of the trustee in public loans in some Continental countries. That innovation is by no means devoid of difficulty. The conception of the trustee in Anglo-Saxon law is based on the trichotomy of legal rights, equitable interests and contracts. The legal systems built upon the Roman law know two kinds of rights only, namely *jura in rem* and *jura in personam*. This is the reason why the Continental systems are unable to provide a legal conception appropriate to that of the trustee. The difficulties resulting from attempts to introduce the Anglo-Saxon trustee in the Continental systems are discussed by F. Weiser, *Trusts on the Continent of Europe* (London: Sweet & Maxwell, 1936).

[4] Meeting of the Council of January 23, 1936, in *Monthly Summary of the League of Nations*, vol. xvi, 1936, p. 20.

Sir John Fischer Williams considers the latter type of the international state loan as " the more important subject " judged from the point of view of financial significance.[1] The present article is confined to the usual type of the international government loan. It is immaterial in this connexion whether the debtor government has contracted with a single firm or a small committee of bankers who undertake, in their turn, to distribute the loan to the public, or, what is less frequent, the debtor government has invited the members of the public directly to subscribe to the loan.

The disparity of status between the parties to the contract of loan implies a difficult problem of classification. Is the international government loan subject to the rules of public international law or of municipal law, and more particularly of the rules of conflict of laws of any municipal system ? It is commonly said that International Law is that body of legal rules governing the relationship between states. Objection has been raised against this " spurious theory of an international law of co-ordination," and it has been suggested that international law should be considered as a system of rules governing an existing community of interests and functions.[2] Justified as these observations are with regard to the juristic basis of the Law of Nations, it is difficult for practical purposes to dispense with the general rule that states only can be the subjects of this branch of the law.[3] This places an almost unsurmountable obstacle in the way of recognizing the international law character of the external government loan. And yet the Permanent Court of International Justice, in the *Case concerning the Serbian and Brazilian Loans*, has attributed that character to the transaction. In that case a dispute had arisen between private creditors resident in France and the debtor governments whether the latter were bound to discharge their obligation on the gold value basis or whether they were at liberty to redeem the loans in depreciated franc currency. The French Government took up the case of its nationals and made representations to the debtor governments. The Permanent Court held, by a majority decision, that there existed two disputes—one between the private creditors and the debtor states and the other between the French Government and the debtor states. It held that these disputes though "fundamentally identical" were to be distinguished in the sense that the one between the states was subject to the jurisdiction of the court, while the dispute between the private creditors and the debtor states was not. This legal fiction closely resembles the devices employed by the Common Law courts of England for the purpose of extending their jurisdiction. The Permanent Court of International Justice has thus avoided the danger of being stultified by too narrow rules of procedure. It can, however, hardly be contended that there is much force in the reasoning of M. E. Pessôa, one of the dissenting members of the Court, that the two legal obligations which the majority had considered as "fundamentally identical" are actually an inseparable entity.[1]

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[1] Sir John Fischer Williams, *International Law and International Financial Obligations arising from Contract*, Bibliotheca Visseriana, 1924, vol. ii, at p. 3. This is a translation of the lectures delivered by Sir John Fischer Williams at the Académie de Droit International in 1923 ; *cf.* " Le droit international et les obligations financières internationales qui naissent d'un contrat " in *Recueil des Cours*, Tome i, 1925, pp. 293–361.

[2] Dr. H. Lauterpacht, "The Nature of International Law and General Jurisprudence," in *Economica*, 1932, at p. 317.

[3] *Cf.* the Statute of the Permanent Court of International Justice, Art. 34, Publications of the Permanent Court of International Justice, Series D, Acts and Documents concerning the organization of the Court, 2nd ed., at p. 15.

The problem of classification has been much discussed by the jurists on the Continent. It is, however, occasionally not easy to follow the trend of their thought. Thus, Professor Zorn, after having stated that the transaction is in the nature of a private obligation qualified only by the fact that the debtor is a state and not a private person, goes on to say that the payment of interest on state loans is effected in pursuance of "*Staatshoheitsrechte*" and does not form part of the private law.[2] Dr. G. S. Freund observes that the public loan is in the nature of a transaction of private law; he adds, however, that in the case of the external debt owed to creditors not resident in the territory of the debtor state the contract is to be considered analogous to an international treaty concluded between subjects of International Law.[3] Professor N. E. Politis denies the international government loan both the character of a private contract and a *naturalis obligatio* in the ordinary sense, and he thinks that the only sanction attending the breach of this obligation is "*le discrédit et le déshonneur de l'état.*"[4]

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[1] Publications of the Permanent Court of International Justice, Series A, Nos. 20–1, at p. 63. M. M. Novacovitch expressed the same view, for slightly different reasons (*op. cit.*, at p. 76).

[2] Professor Dr. Phillip Zorn, "Der Rechtsschutz der Staatsgläubiger gegenüber fremden Staaten," *Bankarchiv*, VI. Jhrg., 1907, at pp. 105–6.

[3] Dr. G. S. Freund, "*Die Rechtsverhältnisse der öffentlichen Anleihen*," Berlin, 1907, at pp. 55 ff., 59 ff.

[4] Professor N. E. Politis, "*Les emprunts d'état en droit international*," at pp. 280–3 (Paris, 1898).

Dr. M. S. Kebedgy maintains that an investor who purchases bonds issued by a foreign government embarks on "*un acte de spéculation, une opération plus ou moins aléatoire.*" [1] Professor v. Bar observes that the state has the supreme task of maintaining its existence, and that the payment of its debts is a matter of secondary importance; he compares the position of the debtor state with that of a debtor in bankruptcy to whom an allowance has been granted for supporting himself and his family, and he suggests that the state, in the same way, shall enjoy a *beneficium competentiæ* on a large scale.[2] This examination of the continental authorities shows that the learned writers though conscious of the various problems connected with the international government loan are far from agreeing whether to classify this transaction under the rules of International Law or under those of the Conflict of Laws.

The international government loan of the ordinary type, it is submitted, cannot properly be classified in either category. Firstly, this problem cannot be solved by dividing the transaction in two independent legal bonds, one pertaining to the domain of International Law and the other to the province of the Conflict of Laws. The majority of the Permanent Court of International Justice expressed this view, as explained above, for reasons of procedure rather than with regard to the substantive law of the international government loan. From the doctrinal point of view, the obligation arising from the contract of loan is an inseparable entity. Secondly, it is inherent in this transaction that it connects parties who exist in different legal spheres. If the state A grants a loan to the state B the transaction is governed by the rules of International Law exclusively, and if, on the other hand, a private corporation issues a loan to private creditors no other legal questions than those pertaining to the Conflict of Laws are involved. In the case of an international government loan, however, the contract is concluded between a subject of International Law on one part and private persons on the other part. The disparity of status between the sovereign borrower and the private lenders is the cause why this type of the international government loan does not fit in either category of the traditional dichotomy but is of an intermediary character. In practice no clear line of demarcation is possible between the sphere of International Law and of Conflict. The peculiarity of the legal nature of this contract will become more evident if we examine it under the aspect of either system. From the point of view of International Law, it is the private nature of the transaction, and in the light of the Conflict of Laws, it is the sovereign character of the debtor which are the dominating features of this transaction.

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[1] Dr. M. S. Kebedgy, "De la protection des créanciers d'un état étranger," in *Journal du Droit International Privé* edited by E. Clunet, 1894, vol. xxi, at p. 504.

[2] Professor L. v. Bar, *Theorie und Praxis des internationalen Privatrechts*, 2nd ed., vol. ii, at p. 663.

The International Government Loan from the Point of View of International Law.—We have a full account of this side of the international government loan by Sir John Fischer Williams in his lectures on "International Law and International Financial Obligations arising from Contract."[1]

The learned author contrasts there the two prevailing doctrines. The first finds its expression in Lord Palmerston's circular of 1848, which asserts the right of the state to resort in the protection of creditors who are its subjects to diplomatic and even military intervention against the debtor state which is in default. The second view is the "*doctrine de Drago*," which denies the state the right to exercise compulsion against the debtor state in the interest of private creditors. Dr. Drago, then Foreign Minister of the Argentine, developed his doctrine after the Venezuelan dispute in 1903. That dispute led to a convention adopted by The Hague Peace Conference of 1907, which provided for the limitation of armed force for the recovery of contract debts claimed from the government of one country by the government of another as owed to its nationals. The convention laid down that resort to military intervention was permitted only if the debtor state declined to accept arbitration or to submit to the award.[2] Sir John Fischer Williams criticizes these doctrines and advances a third theory. In his view, the obligation which the debtor state has undertaken is in the nature of an international obligation and differs in no way from other obligations arising from international agreements. This latter view is, it is believed, most in conformity with modern International Law. It is also in accordance with the attitude of the League of Nations when default was made with regard to some of the so-called League Loans. In 1932 the British Government transmitted a memorial of the League Loans Committee (London) to the Council of the League of Nations and requested it to take notice of the complaints laid down in that document. The Council, after having consulted the late Sir Austen Chamberlain, the chairman of the Committee, expressed the view that it was desirable that the debtor states should co-operate with the financial experts of the League. It further directed the Financial Committee of the Council to suggest other remedies if necessary.[1]

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[1] See *ante* at p. 181 (footnote).

[2] Sir John Fischer Williams, *op. cit.*, at p. 41.

It is, however, important to ascertain the exact range of these doctrines. The doctrines of Lord Palmerston, of Dr. Drago and of Sir John Fischer Williams are confined to a limited question, namely the employment of force against a debtor state which neglects its duties towards private creditors. They are of no avail with regard to the peaceful settlement of disputes concerning the external debt in special arbitral tribunals or in the constituted courts of international justice. When disputes arising from the contract of an international government loan come to the cognizance of such international bodies they are approached in another way. This will be seen from the decision of the Permanent Court of International Justice in the *Case concerning the Serbian and Brazilian loans*. After having asserted its jurisdiction the court said[2]:

> Any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as Private International Law or the doctrine of the Conflict of Laws.

Before international courts the international law character of the obligation disappears, and it remains a legal relationship which is governed by some system of municipal law. It would thus appear that there is no difference whether the court to which the dispute is submitted is of international or municipal status.

The view that in questions other than diplomatic and military intervention the private character of the contractual obligation constitutes the predominant feature, is confirmed by the experience of practice. Mr. F. Weiser, in his book on *Trusts on the Continent of Europe*, suggests draft clauses for general bonds of international government loans which are designed with the view of avoiding the difficulties that have arisen in practice.[3] One of these clauses provides for the introduction of a permanent arbitral tribunal, and another states the law which shall be applied by it. The learned author suggests, in general, the municipal law of the debtor state as the law applicable by the tribunal, but as far as the institution of the trustee is concerned he advocates that the notions of the Anglo-Saxon system shall be taken into account if such institution is unknown to the law of the debtor country. These suggestions clearly indicate the tendency of practitioners to provide for the application of municipal law in the international tribunals which have to decide disputes on the international government loan.

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[1] League of Nations, *Official Journal*, 1932, vol. xiii, 2, at p. 1926 (No. 3136) and at p. 2000 (No. Annex 1399).

[2] Publications of the Permanent Court of International Justice, Series A (Nos. 20–1) (Judgments Nos. 14 and 15), at p. 41.

[3] See *ante* at p. 180, footnote 3.

The essentially municipal character of this transaction lies, it is submitted, at the bottom of the Drago doctrine. He writes[1]:

> The government in this case acts as an ideal or judicial person, competent to assume the bond which it thus takes upon itself. It does not in reality act in its character as a sovereign power, but as a party to a bilateral contract subject in so far to the rules and provisions of private law.

A similar view was expressed by M. Carlin, the Swiss delegate to The Hague Peace Conference, 1907,[2] and this was apparently the reason why the Swiss delegation refused to sign the convention.

Since the Great War, the state has largely increased its activities in the province of commerce. In consequence, the writers have attached new emphasis to the distinction already drawn by Grotius[3] between acts of the state *qua* sovereign and acts of the state *qua* private person. This distinction is unknown to the law of England[4] and apparently to that of the United States,[5] but it is drawn by a number of continental courts, particularly those of France,[6] Belgium[7] and Greece.[8] Recently, however, the distinction between acts of the state *qua* sovereign and those *qua* private person has found attention even in those countries which have not included it in their legal system yet. Thus, as far as the British Empire is concerned, a resolution of the Imperial Economic Conference (1923) provided that no government within the Empire, so far as it engages in trade, shall be exempt from taxation in another country of the Empire,[1] and in the United States the Draft Convention respecting the competence of courts in regard to foreign states which has been prepared by the Harvard Law School (1932)[2] has accepted this distinction. In the province of International Law, the view that the commercial activities of the state ought to be subject to the ordinary municipal law as if they were transacted by a private person has been given effect in several conventions[3] and has also been recommended by the World Economic Conference of 1927.[4]

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[1] *American Journal of International Law*, 1907, vol. i, at pp. 693–4.

[2] Professor James Brown Scott, *The Proceedings of The Hague Peace Conferences*, New York, vol. ii, at p. 253.

[3] *De jure belli et pacis*, ii, 14(6).

[4] Bankes, L. J. in *Compania Mercantil Argentina* v. *United States Shipping Board* (40 T.L.R. 601): "There is no authority anywhere to be found that the mere fact that a sovereign is engaging in some private trading business subjects him to the processes of the courts of a foreign country."

[5] Professor Joseph H. Beale, *A Treatise on the Conflicts of Laws*, New York, vol. i, at p. 340. On the other hand, the distinction has been drawn in *South Carolina* v. *United States*, 199 U.S. 461–3.

[6] *Magasins universels de la R.S.F.S.R.* c. *Kahn* (Trib. civ., Seine, Référés), 1931, Clunet 412.

[7] *Monnoyer et Bernard* c. *Etat français* (Trib. civ., Charleroi), 1927, Pasicrisie Belge 3, 129–31.

[8] Court of Athens, 1928, No. 1681, upheld on appeal by the Areopagus, No. 29, Themis, vol. xl, p. 842 (taken from the *Annual Digest of Public International Law Cases*, years 1927–8, case No. 109).

It is not easy to say whether the international government loan is an act of the state *qua* sovereign or *qua* private person. Though the loan asumes the form of a private business transaction, it is not of a purely commercial character. The borrowing power of the state is a public function which is as necessary for the exercise of governmental duties as the administration of justice or the maintenance of a military force.[5] In this connexion the old *dictum* may be remembered that *pecunia nervus belli.* The view that the international government loan is not a purely private transaction entered by the state is rightly taken by the Draft Convention respecting the competence of courts in regard to foreign states which has been prepared by the Harvard Law School.[6] Art. 11 para. 1 of this Draft lays down the general rule that a state which engages in business in a foreign country shall be amenable to the municipal courts without claiming the privilege of immunity, and para. 2 of this Art. reserves the right of the state to refuse to be made a respondent in proceedings relating to the public debt. The interconnexion of the public and the private incidents of the contract of loan is, it is believed, so close that it is impossible to classify it in either category without neglecting the incidents inherent in the other. The distinction between acts *qua* sovereign and transactions *qua* private person coincides with that between the International Law and the Conflict of Laws which we have considered when examining the problem of classification.[1] There we have arrived at the result that the international government loan of the ordinary type is a *contractus sui generis.* Accordingly, we may well assume here that this contract is of a peculiar nature because it is concluded between a state acting *qua* sovereign and persons who are incapable of acting otherwise than *qua* private persons.

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[1] *American Journal of International Law*, Official Documents, 1932, at p. 608.

[2] *Ibid.*, Art. 11, pp. 597–608.

[3] *Cf.* the Convention relating to the Regulation of Aerial Navigation, of Paris (October 13, 1919), Art. 30 (11 League of Nations Treaty Series, at p. 174); the Brussels Convention for the Unification of Certain Rules Concerning the Immunities of State-owned Ships (April 10, 1926), *Revue trimestrielle des lois, décrets et traités de commerce, l'Institut International du Commerce* (Bruxelles), 1926, at p. 115; *American Journal of International Law*, Official Documents, 1932, Draft Convention on International Law, prepared by the Harvard Law School, at pp. 562–3.

[4] *Final Report of the World Economic Conference*, Geneva, May 1927 (League Document C.E.I.44 (1) at p. 21).

[5] The connexion between bonds and money is mentioned, *passim*, by Nussbaum, "Basic Monetary Conceptions in Law," *Michigan Law Review*, vol. 35, 1937, p. 882.

[6] *American Journal of International Law*, Official Documents, 1932, at pp. 451, 597.

The International Government Loan from the Point of View of the Conflict of Laws.—In the province of the Conflict of Laws there are three sets of rules which might be affected by the peculiar character of the international government loan. Firstly, it may be asked whether the obligation of the debtor state is in the nature of a legally binding promise at all. Secondly, the jurisdiction of the courts in disputes arising from the contract of loan might be affected by the peculiar status of the promiser. Thirdly, it has to be examined whether the proper law of the contract of loan has to be ascertained in a way diverging from the general principles of the Conflict of Laws.

(*a*) It has been maintained that the obligation of the debtor state is binding " in honour only " but not binding in law.[2] This view is apparently supported by a remark of Sir George Jessel in *Twycross* v. *Dreyfus*.[3] The Master of the Rolls said :

> The result, therefore, is that these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the government which issues them, but are not contracts enforceable before the ordinary tribunal of the country which issued them without the consent of the government of that country.

These observations are clearly in the nature of an *obiter dictum.* They amount to nothing more than to an assertion that the English courts do not assume jurisdiction over a foreign sovereign unless he has waived his immunity. The *dictum* of the Master of the Rolls reflects the juristic thought of his time which has found its outstanding formulation in the Austinian view on sovereignty, according to which the power of a sovereign is incapable of legal limitation. The modern lawyer, on the other hand, is accustomed to distinguish between the internal and the external sovereignty, and whatever may be the position with regard to the internal sovereignty in relation to foreign states and to foreign subjects resident abroad, the promise of the debtor state is, as Sir John Fischer Williams has stated it, in the nature of an international obligation and consequently binding in law. Attention may be drawn to the cautious way in which Sir George Jessel expresses himself. He does not deny all binding force to the promise of the Peruvian Government, which he describes as " binding so far as engagements of honour can bind." It is a common experience in the Conflict of Laws that an obligation may be unenforceable in the country A but binding in the country B. A claim barred by the Statute of Limitations in this country may be enforceable in another *forum*. The qualification which Sir George Jessel has added to his statement permits of the conclusion that he had accepted the view that the promise of the Peruvian State, though unenforceable in an English court, might well be binding otherwise.

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[1] See *ante* at pp. 183 ff.

[2] Phillimore, *Commentaries on International Law*, 3rd ed., vol. ii, p. 18 ; Savigny, *Obligationenrecht*, vol. ii, p. 110 ; N. E. Politis, *Les emprunts d'état en droit international*, Paris, pp. 280–3 ; Berr, *Etudes sur les obligations émies par les sociétés, les communes, les départements*, Paris, p. 235 ; M. Milanowitch, *Les traités de garantie au XIX siècle*, p. 394 ; Dr. M. Kebedgy, " *De la protection des créanciers d'un état étranger,*" in Clunet, vol. xxi, 1894, pp. 59, 504.

[3] (1877) 5 Ch. D. at p. 616.

With regard to the internal sovereignty, the constitution sometimes attempts to bar the legislative power to dishonour the promises given by their predecessors. These constitutional rules afford no absolute protection to the bondholders because there lies somewhere, in any case, the supreme internal authority which could even alter the constitution. Further, the constitutional continuity may be interrupted, as in the case of a revolution, and then the way is open to a repudiation of the governmental debt. This happened in the case of the Soviet Union with regard to the Imperial Russian loans. Under normal circumstances, however, the constitutional barriers will prevent the state from abusing the sovereign power. Thus, in *Perry* v. *The United States*[1] the Supreme Court of the United States declared as unconstitutional the Joint Resolution of Congress of June 5, 1933, as far as it attempted to abrogate the gold clause in American Government bonds. The court strongly maintained that the Congress is prevented by the constitution from employing the sovereign power for the repudiation of a promise given by the Government : " The binding quality of the promise of the United States is of the essence of the credit which is so pledged." The constitution of the Netherlands provides that "the obligations of the State towards its creditors are guaranteed and that the public debt shall be taken under consideration annually for protecting the interests of the creditors of the State" (Art. 176).[1]

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[1] 294 U.S., p. 330.

In summing up, it would seem that the thesis that the government loan were binding in honour only is not of great importance. In the practice of the courts it means nothing more than a circuitous description of the general immunity of a foreign sovereign. It has, further, to be qualified in so far as the exterritoriality in the courts of a third country does not exclude that the contract of loan is enforceable in the competent court and has, in addition, the nature of an international obligation.

(*b*) With regard to the jurisdiction of the courts in cases concerning the international government loan, the position of the debtor state is different whether the action is brought in the courts of a third country,[2] in the courts of the debtor state or in the international courts.

The debtor state is not subject to the jurisdiction of the courts of a third country unless it has expressly submitted to this *forum*. This rule has been laid down in a great number of cases in England,[3] in the United States,[4] in France [5] and in other countries. The courts of Italy,[6] Belgium [7] and Switzerland,[8] on the other hand, have refused such immunity to the debtor state. The question of jurisdiction over the contractual obligation of a foreign sovereign is not an isolated problem. It is an application of the general rule that the acts of a foreign sovereign or his property enjoy the privilege of immunity, as in English law laid down in *Mighell* v. *Sultan of Johore*.[9] In countries which make a difference between the acts of the sovereign *qua* sovereign and *qua* private person,[10] the immunity depends on whether the courts attach more importance to the matter than to the form. Even the courts of Italy, Belgium and Switzerland do not overlook that the loan is issued in discharge of the functions *qua* sovereign, but they consider it decisive that the transaction takes the form of a private contract. It has been explained earlier that the dichotomy of acts *qua* sovereign and acts *qua* private person is not appropriate to a transaction like the international government loan because this contract is composed of features of either part. Accordingly, the debtor state should be conceded immunity in the foreign courts, since this consequence is required by the comity of nations no matter how much and which aspect of the sovereign power of another state is involved.

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[1] F. Meili, *International Civil and Commercial Law* (translation by Mr. Arthur K. Kuhn), New York, at p. 341.

[2] The expression "courts of a third country" includes, in this connexion, the courts of the country where the private creditors of the loan reside.

[3] *Wadworth* v. *Queen of Spain*, (1851) 17 Q.B. 171; *Smith* v. *Weguelin*, (1869) L.R. 8 Exch. 198; *Twycross* v. *Dreyfus*, (1877) 5 Ch. D. 605.

[4] *Leavitt* v. *Dabney*, (1868) 37 Howard's Practice Reports 264; *Hassard* v. *United States of Mexico*, (1899) 61 New York Supplement 939.

[5] *Reilhac et Chabot* c. *Comptoir National d'Escompte* (Trib. civ., Seine, 1895), 1908, 2 Gazette des Tribunaux 2.270, 272; *Gouvernement du Maroc et Maspero* c. *Laurans* (Cour d'appel, Aix, 1929), 1930. 1. Gaz. Pal. 246.

[6] *Hamspohn* c. *Bey of Tunis*, (Corte d'appello, Lucca) 1887 Foro Italiano 1.474.

[7] *Etat de Bahia* c. *Feldman*, (1908) Pasicrisie Belge 2.55.

[8] *K.K. Oesterreichisches Finanzministerium* g. *Dreyfus*, (1918) 44 E.B.G. 54–5.

[9] [1894] 1 Q.B. 163.

[10] See *ante*, pp. 186 ff.

The position of the debtor state in his own courts is regulated by the constitution of this state. It can be assumed that all civilized communities provide for some kind of procedure against the state, either as a matter of grace as in England, where the Petition of Right is the appropriate remedy, or as a matter of right as in Australia or in the United States. On the Continent, the idea of the fisc is occasionally invoked.[1] The fisc is the personification of the state in matters of civil law, though they may originate in public functions of the state. The fisc, once involved in a legal issue, has the same position as a corporation except for a few negligible privileges.

With regard to the jurisdiction of the international tribunals, the parties may have provided expressly for special arbitral boards. The resolution of the Assembly of the League of Nations of September 28, 1935, which has been mentioned above refers to such system of arbitration.[2] Mr. F. Weiser in his draft of a general bond of an international government loan recommends also a clause providing for a permanent arbitral tribunal. To bring the case before the Permanent Court of International Justice, it is requisite, *inter alia*, that a state "takes up" the case of the bondholders because subjects of international law only have standing in this court. Once the court has assumed jurisdiction, it will, as we have seen, immediately apply a municipal system of law.

(*c*) The most intricate but no doubt the most important question with regard to the Conflict of Laws is how far the general rules determining the proper law of the contract are affected by the peculiar character of the international government loan.

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[1] For a commendation of that idea see Professor J. H. Morgan in *Remedies against the Crown*, introductory chapter to *Public Authorities and Legal Liability* by Gleeson E. Robinson, London, 1925, at p. lv.

[2] League of Nations, *Official Journal*, Special Supplement, No. 137, October 1935, at p. 16. See *ante* at p. 180.

It will be remembered that the English lawyer, faced with the problem of ascertaining which of the conflicting systems of law governs a contractual obligation, has to find out what is "the proper law" of the contract. This is the legal system with which the contract has the most intimate connexion either according to the express or the "presumed" intention of the parties. It is, further, common ground that the courts have developed and are still evolving certain presumptions which are designed to assist in ascertaining the proper law. The most important of them are the *lex loci contractus*, the *lex loci solutionis* and, in special circumstances, the law of the flag of the ship. The question is whether in case of the international government loan a special presumption is given in favour of the application of the law of the debtor state, similar to that of the law of the flag in maritime contracts.

It should be remembered that these presumptions serve no other purpose than to ascertain the intention of the parties. Thus, nobody has ever maintained that the presumption in favour of the law of the debtor state is of a conclusive character. This presumption, as the others, may be rebutted if the surrounding circumstances make it clear that the parties have desired to submit the contract wholly or in part to another legal system. The fact that the presumption is rebuttable in exceptional cases or with regard to particular aspects of the contract of loan does not, however, derogate from the value of such presumption as a "*prima facie* inference."[1]

Before entering in an examination of the cases concerned with the international government loan we may mention two points which appear to militate in favour of a special presumption respecting the law of the debtor state. Firstly, the obligation of the debtor is unenforceable except in the courts of the debtor state.[2] It has been laid down in *re Missouri Steamship Company*[3] and in *P. & O. Steam Navigation Company* v. *Shand*[4] that it is unreasonable to assume that the parties intended to submit to a legal system other than that which vests the contract with full legal validity. Further, reference to a special *forum* is generally considered as implying the application of the substantive law prevailing in the agreed tribunals because it is only natural that the courts which are expressly invoked shall apply the system with which they are best acquainted. This conclusion has been drawn in *Hamlyn* v. *Talisker Distillery*,[1] in *Spurrier* v. *La Cloche*[2] and in *N.V. Kwick Hoo Tong* v. *Finlay*.[3] In the case of the international government loan the courts of the debtor state are usually not expressly agreed, but they are the only ones which are competent to deal with the suit unless the promisor has submitted to another *forum* or the case is taken to the Permanent Court of International Justice. The fact that the obligation of the debtor state is from the point of private law unenforceable except in its own courts and that the jurisdiction of its own courts is practically exclusive, points strongly to the parties having intended to submit to the law of the debtor state. Secondly, the fund which provides for the payment of the debt is collected and situate in the territory of the debtor state. In *Spurrier* v. *La Cloche*[4] a London insurance company had insured the stamp collection of the plaintiff, who resided in Jersey. The Judicial Committee in explaining that this was a London contract declared that the stipulation to pay out of the funds of the company " is of itself very significant." The same reason applies with even more force in the case of a governmental loan. Thus, in the case of a long-term loan issued by the English Government, the loan is charged upon the Consolidated Fund. It is impossible to ascertain the income liable for the redemption of the loan without reference to the relevant English enactments and particularly to the Consolidated Fund Act of 1787.[5] However, these considerations do not apply if the debtor state has deposited trust securities by private trust deed in the country where the loan is floated. Therefrom it may be inferred that the parties intended to submit to the *lex situs* of the pledge the part of the contract of loan relating to the securities, and this, again, may indicate that the whole transaction of the loan should be submitted to this law. Further, if a state loan is guaranteed by other states, as was the case in the Austrian Loan issued under the auspices of the League of Nations,[6] the obligations of the principal debtor and the guarantors may be governed by different legal systems, and presumably the obligations of each sovereign concerned will be subject to the law of the state concerned.

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[1] Per Lord Atkin in *The King* v. *International Trustee*, [1937] A.C. at p. 528.

[2] Except so far as the international character of the obligation is at stake.

[3] (1889) 42 Ch.D. 321.

[4] (1865) 3 Moo.P.C. (N.S.) 272.

We proceed now to examine the cases concerned with the law applicable to the international government loan. In *Smith* v. *Weguelin*,[1] Lord Romilly inferred from the fact that the obligation of the debtor state is enforceable in its courts only, that the parties must have intended the application of the substantive law of that state. This *dictum* was quoted with approval by Lord Selborne in *Goodwin* v. *Robarts*.[2] The authority of these statements has, however, been questioned in the recent case *The King* v. *International Trustee*.[3] The facts of this case were as follows. In 1917, the British Government issued a war loan in the United States. The bonds provided for the payment of principal and interest at the option of the holder either in New York in gold coin of the United States of the standard of weight and fineness existing at the date of the issue or in London in sterling money. The suppliants who were bondholders of this loan exercised the New York option and maintained that the British Government was obliged to redeem the loan on the gold value basis and that the American Joint Resolution of June 5, 1933, which invalidated the gold clause in contractual obligations was of no avail to the Government because the essence of the contract was subject to English and not to American law. The *lex loci contractus* as well as the *lex loci solutionis* were American law, but the suppliants relied on the presumption that a contract concluded by a sovereign is intended by the parties to be governed by the law of the debtor state. Branson J., who tried the case in King's Bench,[4] and the Court of Appeal,[5] consisting of Lord Wright, Slesser L.J. and Romer L.J., were of opinion that English law governed the transaction. Lord Wright, who delivered the judgment of the Court of Appeal, said :

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[1] [1894] A.C. 208.

[2] [1902] A.C. 446.

[3] [1927] A.C. 604.

[4] [1902] A.C. 446.

[5] 27 Geo. III c. 13, No. LVIII.

[6] Dr. A. Plesch and Dr. M. Domke, *Die Oesterreichische Völkerbundanleihe* (Zürich, Polygraphischer Verlag A.G., 1936).

> There are special features which exist in the case of a contract by a Government which may well make it the proper inference that contracts into which they enter are to be governed by the law of that government.

Branson J. as well as the Court of Appeal based their view on the ground that the courts of the debtor government have exclusive jurisdiction and that it must be assumed that the parties have intended to submit the contract of loan to the law prevailing at this *forum*. The House of Lords, on the other hand, unanimously came to the conclusion that the loan was subject to American and not to English law. Their Lordships (Lords Atkin, Russell,

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[1] (1869) L. R. 8 Eq. 198.

[2] (1876) 1 A.C. at p. 494.

[3] [1937] A.C. 500.

[4] 52 T.L.R. 82.

[5] 53 T.L.R. 64.

Maugham, Roche, Macmillan) agreed that great weight has to be attached to the fact that the debtor was a sovereign state but they held that there were other circumstances prevailing in this case which made it clear that the parties had intended to submit the contract to American law. Their Lordships considered it as decisive that the issue of the bonds was preceded by an issue of short-term notes which were secured by trust securities deposited by way of private trust deed in New York. Their Lordships inferred therefrom the intention of the parties to submit the issue of the short-term notes to American law. They considered the subsequent issue of the long-term bonds as part of the same transaction and did not accede to the argument that the funds securing the bonds were not any longer represented by the trust fund in the City of New York but by the British Consolidated Fund and that it was improbable that the parties had intended to submit part of the public debt of Great Britain to the fluctuations of the American currency.

Until the judgment of the House of Lords in *The King* v. *International Trustee* [1] it was safe to say that in contracts concerning the international government loan there existed in English law [2] the same presumption in favour of the law of the debtor state which exists in many continental legal systems.[3] It is doubtful how far this rule has been affected by the said judgment. Perhaps the best explanation of this judgment is to be found in Lord Roche's speech. The learned Lord says with reference to the *dicta* of Romilly M.R. and Lord Selborne which previously were considered as authorities in favour of a special presumption respecting the law of the debtor state :

> But, though I regard them as still generally applicable to most transactions of the character of the transaction now in question, yet this transaction was of a very exceptional character.

The result would be that *The King* v. *International Trustee* [4] rests upon the special circumstances which prevailed at the time of the issue of these war bonds, that the presumption in favour of the law of the debtor state is still the general guide in cases concerning the international government loan, and that this presumption is rebuttable not only *expressis verbis* but also by the special circumstances of the case. This interpretation of *The King* v. *International Trustee*[1] would be in conformity with the character of the international government loan as a transaction embodying both Public and Private Law features.

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[1] [1937] A.C. 500.

[2] Professor Joseph H. Beale, *Conflict of Laws*, vol. ii, at p. 1102.

[3] M. Schmitthoff, " The Gold Clause in International Loans," in *Journ. Comp. Leg.*, Third Series, vol. xviii, at p. 275.

[4] [1937] A.C. 500.

Conclusion.—It would thus appear that the international government loan is a contract of a peculiar nature. The peculiarities of this transaction find their explanation in the disparity of status of the contracting parties. The same peculiarities account for the anomalous position of the international government loan both in the province of International Law and in the system of the Conflict of Laws.

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[1] [1937] A.C. 500.

THE PROGRESS OF LAW REFORM IN CHINA.[1]

[*Contributed by* George W. Keeton, Esq., M.A., LL.D.]

For two centuries after the beginning of modern commercial intercourse with China, the Chinese officials were entirely unconscious of any necessity for law reform. The penal code had existed in one form or another for two thousand years, and the customary law was obviously so intricately bound up with the lives of the people that reform was unthinkable. Chinese law was, in fact, such a monument of human wisdom that its full application was denied to the foreigner—simpler rules were devised to regulate his barbarous condition—and the records of the British East India Company show that efforts on the part of Europeans to translate it were impeded. It is possible that Staunton's translation, published in 1810, cost more than one Chinese life, for Chinese interpreters suspected of "betraying" the laws to the foreigner were summarily executed. Sir George Staunton himself, however, was profoundly impressed by the excellence of Chinese laws, as reproduced in the code, and other foreigners who have studied them (in particular Boulais, whose translation was published in 1924) have affirmed his opinion. Nevertheless, all foreigners were at one in insisting that their countrymen in China should be withdrawn from Imperial jurisdiction. The main explanations of this apparent paradox are: (1) The theory of responsibility, whereby relative or neighbour or superior might suffer for the offence of a wrongdoer who had fled. This was a theory which the West seemed finally to have abandoned, until modern dictatorships restored it; (2) The power of a magistrate to add to the law at pleasure through the publication of a new edict, which might even contemplate a particular individual. This, too, is a concept which modern dictatorships have reintroduced after it had long been abandoned by the West; (3) The hopeless corruption, confusion and delay which attended the administration of justice in China; (4) The impossibility of discovering the content of Chinese commercial law; (5) The overfrequent use of the death penalty in Chinese criminal law, and the employment of judicial torture, not only upon the accused, but upon witnesses.[2]

The imposition of extraterritoriality in the nineteenth century, however, brought home to China her true position, and in the last quarter of the century it was finally decided to replace China's ancient legal system with one on the Western model. The movement gained added impetus from the success which had attended Japan's efforts to reform, which had resulted in the abolition of extraterritoriality, and also from the promises inserted by Great Britain, the United States and one or two other Powers into treaties concluded at the beginning of the present century to abolish extraterritoriality as soon as the state of Chinese law permitted it. The result was the establishment of the Imperial Law Codification Commission, which prepared, in association with Japanese experts, a number of draft codes of procedure and of criminal and commercial law. The work was probably completed too quickly. Its aim was to replace as much of the old law as possible by the new codes which, in some cases, were little more than adaptations of the Japanese codes, which in turn were based primarily upon German conceptions. Of these early efforts, however, only the "Provisional Regulations of the High Courts and the Subordinate Courts" (1907), "the Law of the Organization of the Judiciary" (1909) and the Provisional Criminal Code (1909) ever came into operation. When the republic was established, the Criminal Code was promulgated afresh in 1912, but defects had already been detected, and its revision was ordered. The Commission was therefore reorganized, and a revised draft of the Criminal Code was completed in 1914. Since the modifications were not considered to be sufficiently extensive a further revision was undertaken, this being completed in 1921. Once again the changes effected were cautious, and the Commission, in its introduction to the French translation, remarks:

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[1] This article forms part of our learned contributor's Report on Western Influences in Modern Chinese Law prepared for the Second Congress in Comparative Law.

[2] For a fuller discussion see Keeton, *Extraterritoriality in China*, vol. i, ch. 3.

> Another consideration which made the Commission decide not to introduce too many changes into the Provisional Code was this: this Code is very nearly the same as the Japanese Code of 1907. Further, on account of the similarity in the languages, Japanese judicial literature is readily accessible to Chinese magistrates. On the other hand, the chief European and American works on criminal law have not as yet been translated, and there are few Chinese who are able to read the original texts. The introduction of too many notions or formulas borrowed from Western legislation would frequently compel the tribunals to apply rules, the spirit and import of which they do not understand, owing to the paucity of available literature on the subject.
>
> Where there are modifications of the original provisions the Commission has been obliged to reconcile the practical necessities and Chinese traditional usages with the principles of more modern scientific criminology. A perusal of the draft would easily prove that a great deal has been borrowed from the criminal legislation of the most advanced and recently published codes. The Commission is particularly indebted to the Hungarian Criminal Code of May 28, 1878, the Dutch Criminal Code of March 3, 1881, the Italian Criminal Code of June 30, 1889, the Austrian Draft Criminal Code of 1893, the Sudan Criminal Code of 1899, the Swiss Draft Criminal Code of 1903, the Egyptian Criminal Code of February 14, 1904 and the Japanese Criminal Code of 1907, which served as a basis for the wording of the original text. Reference has also been had to the Preliminary Revised Draft of the German Criminal Code of 1909, and to the resolutions of the German Commission of

1914 on Criminal Law Reform and to the counter-draft code prepared by a number of German criminologists in 1911.[1]

Meanwhile, in 1916, Dr. Wang Ch'ung-hui had been appointed Chairman of the Commission, so that henceforth the law reform movement enjoyed the benefit of his vast knowledge of foreign systems, whilst the Commission itself was strengthened by the addition of Mr. Yung K'ang, then Chief Justice of the Chinese Supreme Court and later Minister of Justice, Dr. Lo Wen-Kan (formerly procurator-general of the Republic) and M. Georges Padoux, who had so much to do with the drafting of the modern Siamese codes, the promulgation of which resulted eventually in the abolition of extraterritoriality in that country.

There can be no question that the continuance of the civil war in China very seriously impeded the progress of law reform, not only from the standpoint of law enforcement and judicial reorganization, but also from the point of view of the preparation of the new codes themselves. However, even in spite of the prevailing disorder, the foreign Powers promised at the Washington Conference, 1922, to appoint a commission to inquire whether any modifications of the extraterritorial system were possible. In anticipation of the labours of this commission, therefore, the texts of a number of draft codes were published. Of these, the chief were *The Provisional Criminal Code* (1923) ; *The Regulations Relating to Criminal Procedure* (1923) ; *The Ordinance for the General Regulation of Traders* (1923) ; *The Trade-Mark Law* (1923) ; *The Regulations Relating to Civil Procedure* (1923) ; *Laws, Ordinances, Regulations and Rules Relating to the Judicial Administration* (1923) ; *The Constitution* (1924).[2] A notable omission from this list was a Civil Code, and accordingly, after the Revolution, the deficiency was supplied in the following manner : (1) Those provisions of *Ta Ts'ing Lu Li* which related to civil matters and were not repugnant to the republican form of government were applied ; (2) The decisions of the Supreme Court, based upon those provisions, and also upon customs and general legal principles, were applied ; (3) Certain special laws promulgated after the Revolution were also applied. Thus for some years after the Revolution the civil law of China was mainly a judge-made law.

When the Extraterritoriality Commission visited China in 1926, it recognized the notable advance which these codes represented, but it also expressed a number of important criticisms, which are set out in its report.[3] Some of these are special in character, but two of a general nature may be noticed. The first, which naturally weighed heavily with the Commission, was the lack of stable machinery for the enforcement of the codes.

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[1] Cited Tyau, *China Awakened*, p. 249.

[2] These codes were discussed by the present writer in "The New Chinese Codes," *Journ. Comp. Leg.*, Third Series, vol, viii, pt. iv, p. 225.

[3] Report of the Commission on Extraterritoriality in China, 1926. Cmd. 2774.

> At the present time [the Report observes] the rights and duties of the citizens of the Republic, the separation of the powers of the legislative, administrative and judicial officials, and those powers themselves, are no longer founded on a firm constitutional basis. This has resulted in an encroachment upon the powers of the legislature and the judiciary by the frequently changing administrative officers, who are, in a great number of cases, nominees of the military leaders, and in a corresponding diminution of attempts to give popular sanction to the laws and their administration. Further, it has brought into greater prominence the military law and the military courts with their drastic penalties and procedure at the expense of the civil law and the civil courts.[1]

This is a point on which something more will be said in sketching constitutional developments in China. The second point relates primarily to the substance of the laws themselves :

> In consequence of the comparatively short time in which the new laws of China have been in force, the assimilation of their new principles has not kept pace with the legislation. This has brought about two important anomalies in the existing legal system. In the first place, a number of ancient laws and legal principles dating from former times continue to be in force and applied side by side with the new laws, thus partially nullifying the modern principles and good effects of the latter. For example, a number of the provisions of the *Ta Ts'ing Lu Li*, particularly in connexion with matters relating to personal status, such as concubinage and the bonding of children, and the large powers given to the magistrates, all of which are out of harmony with the spirit of the new codes, continue in force. A second example is to be found in the Law Relating to the Suppression of Robbery, Insurgency and Brigandage, which gives to the military authorities very extensive powers in conducting the trial of such cases in that they do not need to apply the usual rules of procedure. In the second place, the application of a number of the new laws has been restricted, both as regards their provisions and the places where they are enforced.[2]

The survey of Chinese law and administration undertaken by the Extraterritoriality Commission in 1926 showed that no important modifications in the existing system of foreign rights was desirable, and the Commission reported accordingly. This was unquestionably a serious disappointment to the Chinese, but the law reform movement was about to pass into another phase. In 1927 the Chinese Nationalists began their victorious march from Canton to the North. For a time they carried all before them, and it seemed as though China would at length be reunited under a stable government. Even although reality has fallen short of expectation, the National Government at Nanking still remains the only really stable element in Chinese politics, and if an onlooker from a distance might venture an opinion, it may perhaps be observed that there is something in the Nationalist programme which is calculated to make a particularly direct appeal to many different classes of Chinese. In the sphere of law, the process of codification has been pressed steadily forward, a Civil and Commercial Code having been promulgated in 1929, and in 1935 a new Criminal Code came into force. In some instances these codes represent important departures from earlier legislation, and the direction in which the new legislation is tending may perhaps be studied best by a consideration of one or two of the main branches of the law as reflected in the codes.

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[1] Report of the Commission on Extraterritoriality in China, 1926. Cmd. 2774, p. 47.

[2] *Ibid*, pp. 48–9.

The Constitution.—Constitution-making in China has been a popular pastime ever since the reform party became influential at the end of the nineteenth century. Some aspects of these activities have been considered by the writer elsewhere.[1] The movement has passed through a number of exceedingly interesting stages, however. When at the beginning of the present century the court party became finally converted to reform, it was desired to establish a constitutional monarchy within a few years, with an Imperial Cabinet responsible to a National Assembly. Obviously at this stage the reformers were looking to the United Kingdom for their model. After the Revolution in 1911 the work was begun again, and after many delays a new constitution was promulgated in October 1923. At this point, the ideal was still a parliamentary republic governing a unitary state. Towards the end of 1925, still another constitution was devised. This time, a new element had been imported. At this date, it seemed that the best hope of restoring order in China depended upon agreement between the various provincial rulers. The constitution of 1925, therefore, is federal in structure, but it was never more than a paper constitution. Fighting broke out again, and in 1927 and 1928 the Nationalists overran China. Up to this date, all China's successive projects for a constitution consciously followed or adapted some Western model. The Nationalists, however, had a political programme which was founded upon Dr. Sun Yat-Sen's famous work, *The Three People's Principles*, and an organization to put it into force, viz. the Kuomintang Party. The Organic Law of the National Government of China, promulgated on October 4, 1928, is a brief document, but it plainly indicates how far China had travelled away from " orthodox " Western political theory. For the time being, it establishes a dictatorship, controlled by the heads of the Kuomintang Party, but it contains the following interesting preamble :

> The Kuomintang of China, in order to establish the Republic of China on the basis of the Three Principles of the People and the Constitution of Five Powers, which form the underlying principle of the Revolution, having conquered all opposition by military force and having now brought the Revolution from the military stage to the educative stage, deem it necessary to construct a framework for the Constitution of Five Powers with a view to developing the ability of the people to exercise political power, so that constitutional government may soon come into existence and political power be restored to the people.

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[1] " The New Chinese Codes." *Journ. Comp. Leg.*, Third Series, vol. viii, pt. iv, pp. 228–31.

In structure, governmental activity under the Organic Law was divided, not into three, but into five departments—legislative, executive, judicial, examinations, and "control," the two main functions of the latter being impeachment and auditing. This division represents a return to traditional Chinese thought in some respects, for in the Control *Yuan* we can without difficulty detect the Board of Censors of the Imperial régime, whilst the conception of examinations as a separate department of governmental activity is again closely associated with the political thought of the Imperial régime.

In the relations of the Kuomintang to the Government of China, the observer might perhaps detect some distant resemblance to the relations between the Communist Party and the State in Russia. The Kuomintang, however, is not communist. In the early days at Canton it was subject to Russian influence, but after the purge of Russian agents in 1927, the Kuomintang sought its programme in China's own political experience. What will eventually be evolved constitutionally will owe little to modern Western thought, for China has at last realized that her conditions are peculiar, and that out of them alone will a solution of her problems be evolved.

This point is emphasized by the Provisional Constitution of 1931, an extraordinarily interesting document, which is declared to be provisional in the sense that it will last during the period of political tutelage only. In the language of the Kuomintang, political evolution in modern China is regarded as being divided into three periods. The first, of military reconquest, was regarded as having ended with the occupation of Peking by the Nationalist armies in 1928. Then followed the period of political tutelage, during which the people were being prepared for responsible government. This will be followed in turn by the period of democratic government, which the Nationalists hope will be a permanent stage. Accordingly, the preamble to the Provisional Constitution of 1931 explains that it is to pave the way for democratic government. It affirms the sovereignty of the people (Art. 2), and declares the form of government in China to be for ever republican (Art. 3). Various fundamental rights of the Chinese citizen are set out in Arts. 6–27, and the nature of political tutelage is set out in the next section (Arts. 28–32). A very interesting section deals with the duties of the state to develop the people's livelihood, by exploiting natural resources and similar means (Arts. 33–46), and the state's duties with regard to education are dealt with in Arts. 47–58. The division of power between central and local government is set out in Arts. 59–64, and finally Art. 87 declares that a permanent constitution will be adopted when a majority of the provinces have reached constitutionalism. Presumably this means when a majority of the provinces have democratically elected assemblies and own allegiance to the National Government. The Provisional Constitution is supplemented by a revised Organic Law of 1932, which defines the powers of the five *Yuans*.

It is also relevant to notice that a draft permanent constitution already exists, and is at present being discussed by the Kuomintang.[1] This constitution is essentially democratic. It contemplates a People's Congress, elected by universal adult suffrage and secret ballot, but it retains the five *Yuans*, in accordance with Dr. Sun's teaching, and in the permanent constitution, the Control *Yuan* becomes, in name and function, the Censor *Yuan*.

From this brief sketch of constitution-making in China, it will be evident that China has passed through several distinct stages. In the early days of what was perhaps too-hasty reform, there was a disposition to borrow Western forms without regard for the question whether those forms were suitable for China or not. Western unified and federal constitutions were in turn imitated, but when a really national movement at length emerged, it established and is establishing institutions which certainly owe something to recent Western thought, but which are essentially developments from native origins.

Criminal Law.—The Provisional Criminal Code of 1909 was, as we have seen, largely an adaptation of the Japanese Code of 1907. The revised draft of 1921 was based on a study of wider materials and incorporated some notable improvements. The Extraterritoriality Commission remarked of it :

> This second revised draft, in addition to containing in Part I more scientific and precise provisions, also specifies in Art. 62 that the judges shall take into consideration a number of mitigating circumstances in determining punishments, and (Art. 41) affords a more flexible scale of punishments.[2]

A further revision, slightly adapted, was promulgated by the Nationalist Government in 1928, but on January 1, 1935, however, the new Criminal Code was promulgated, and it came into force six months later. As Mr. Ho Tchong-Chan points out in his French edition of this code, the ideas of the Provisional Code were clearly out of date, for there had been more recent experiments in criminal codes in Italy, Spain, Russia, France and the new States of central Europe since then. Moreover, as the Extraterritoriality Commission had indicated, the speed with which new laws had been prepared in China had resulted in some lack of harmony between various parts of the legislation. The Code of 1935 was designed to remove a number of them. The list of codes studied by the Codification Commission in the preparation of this code is most interesting. It includes: the German draft codes of 1925 and 1927 ; the Cuban draft code of 1927 ; the Spanish criminal code of 1928 ; the French draft code of 1932 ; the Italian criminal code of 1930 ; the Japanese draft codes of 1930 and 1931 ; the Philippine criminal code of 1930 ; the Polish criminal code of 1932 ; the Siamese criminal code of 1908 and the draft revised code of 1919 ; the Swiss draft code of 1931, and the criminal codes of the cantons of Fribourg (1924) and Vaud (1931) ; the Czechoslovakian draft code of

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[1] *China Year Book*, 1935, p. 68.

[2] P. 39.

1926; the Turkish criminal code of 1926; the Soviet criminal code of 1926.

The proceedings of the International Congresses on Criminal Law of 1926, 1929 and 1933, and the proceedings of the International Conferences for the Unification of Criminal Law of 1927, 1928, 1930 and 1931 were also consulted. Mr. Ho comments that the Codification Commission has taken notice of the substitution, as the basis of punishment, of the idea of social protection for that of individual punishments. In this connexion he notes that in the final report of the Commission to the Legislative *Yuan*, enclosing the text of the draft code, the following observations appear:

> In the course of the last few years criminological doctrines have developed and international conferences on criminal law are held almost annually. The trend of criminal legislation in different countries has been greatly influenced by it. The most significant change is that there is a drift more and more from the subjective to the objective principle, from the conception of repression to the conception of the protection of the community.

At the same time the Commission did not wish to compile a code which had lost touch with the realities of Chinese conditions, and they have therefore taken account of the professional qualifications of magistrates, of the conditions of modern Chinese life and other similar factors. Moreover, the code shows plain evidences of the influence of Dr. Sun's *Three People's Principles*, which are a logical development from that conception of democracy which is expressed in the phrase: " Government of the people, by the people, for the people." As applied to China these involve the three conceptions of nationality, democratic government and a planned economy in the interests of the community as a whole. Mr. Ho gives a number of examples of the application of these principles in the new code—for example, the placing of both sexes upon a footing of complete equality from the standpoint of the criminal law, the protection afforded to agriculture, industry and commerce, and the repression of usury, whilst in one striking paragraph Mr. Ho points out that officials who have abused their office are subject to specially heavy penalties, since they are regarded not only as repositories of public authority, but also of the doctrines of the Kuomintang, of which they ought to be the upright apostles. In this respect, at least, the new code seems to owe something to the codes promulgated in recent years in Russia, Italy and Germany.

In an exceedingly interesting Preface the Chinese Minister of Justice, Mr. Wang Yung-Pin, says of the main new ideas in this code:

> Comme partisan le plus fidèle du Docteur Sun Yat-Sen et de sa doctrine du Triple Démisme, je suis fort heureux de voir que ses idées nouvelles pénètrent aujourd'hui dans un Code de l'Etat. Pour en donner la preuve et faire connaître au monde la relation étroite de la doctrine avec le nouveau Code, il suffit d'indiquer, ci-après, les points les plus essentiels :
>
> 1. Au point de vue du Démisme racial (principe du Nationalisme) :
>
> Selon la doctrine du triple Démisme, le principe du Démisme racial est

celui qui doit assurer à la Chine l'égalité au point de vue international. Dans ses discours et par ses actes mêmes, le Docteur Sun Yat-Sen a montré maintes fois que cette tâche difficile de restaurer la situation internationale de la nation chinoise incombe nécessairement au peuple tout entier, c'est à dire à tous nos 400,000,000 de concitoyens.

Mais, pour que le citoyen puisse bien accomplir sa tâche, il est une condition *sine qua non* : être en bonne santé. C'est donc dans l'esprit de notre doctrine que le nouveau Code, par les dispositions de l'article 192, alinéa 2, de l'article 285 et des articles suivants s'attache à la protection de la santé publique.

De plus, toujours en conformité du même esprit, l'article 120 du Code punit d'une pénalité particulièrement grave, tout fonctionnaire public qui abandonne à une invasion étrangère le territoire de l'Etat qu'il est chargé de défendre. Cela se comprend bien, car il s'agit, ici, de l'existence même de la nation.

2. Au point de vue du Démisme gouvernmental (principe de démocratic) :

Le principe du Démisme gouvernemental est celui qui doit établir l'égalité entre tous les citoyens chinois, au point de vue politique. Le fondateur de notre République a distingué quatre sortes de droits civiques : droit d'élection, droit de révocation, droit d'initiative et droit de referendum. Selon lui le régime véritablement démocratique n'existe que dans un pays où le peuple peut exercer ce quatre sortes de droits pour contrôler les cinq pouvoirs du gouvernement.

Etant les sources fondamentales du gouvernement, les droits civiques doivent forcément être garantis par les lois et, d'autre part, ne peuvent être exercés sans certaines limitations.

Dans le sens de la garantie, les sanctions pénales résultant des articles 142 à 148 frappent tous les délits contre l'exercice libre du droit d'élection politique et des autres droits de suffrage prévus par la loi.

Dans le sens de la limitation, la privation des droits civiques, article 36, alinéa 3, affecte aussi la capacité d'exercer toutes les quatre sortes de droits cités plus hauts. La privation de ces droits est également nécessaire car, si l'on permettait aux mauvais citoyens de les pratiquer, ce serait non seulement contraire à l'esprit du Démisme gouvernemental, mais une atteinte portée aux droits des autres.

De même, l'article 137 prévoit des peines pour les actes frauduleux commis dans les examens qui, d'après la constitution des cinq pouvoirs, sont organisés pour réserver aux hommes vraiment capables la charge des fonctions publiques,

La sincérité dans les examens intéresse à un trop haut degré le bon fonctionnement de l'administration, pour qu'on ne l'assure pas par des sanctions pénales.

3. Au point de vue du Démisme vital (principe de sociologie) :

Ce principe tend à établir l'égalité entre les citoyens chinois au point de vue économique. Les pratiques des usuriers qui exploitent généralement les gens les plus pauvres constituent un grand obstacle au développement des moyens d'existence du peuple. En cette matière, les lois de l'ancien régime prescrivaient des sanctions très sévères qui ont été abolies plus tard par le Code pénal provisoire de 1912. Après la victoire de l'expédition contre le Nord, malgré les résolutions du conseil exécutif central, les décrits du Gouvernement National et les nouvelles dispositions du Code Civil, il n'y

avoit sur la matière aucune prescription pénale. En 1928, le règlement sur la répression des mauvais notables promulgué par le Gouvernement National, avait bien prévu le délit d'habitude d'usure. Mais ce délit avait cessé d'être punissable du fait de l'abolition du dit règlement, de sorte qu'en réalité les délinquants devenaient de plus en plus nombreux, n'ayant à se soucier d'aucune sanction pénale, en dehors des nullités civiles.

Heureusement l'article 344 du nouveau Code a consacré en cette matière, des dispositions tout à fait louables. Dans l'impossibilité d'édicter un taux maximum identique pour l'ensemble du pays où les conditions économiques diffèrent de région en région, l'article détermine qu'il faut entendre par " usure " l'intérêt nettement hors de proportion avec le capital prêté. Grace à cette disposition claire et précise, le juge pourra ainsi statuer dans chaque cas suivant les conditions particulières à chaque localité.

The implications of this last point must not be overlooked.

One last important feature of this most interesting criminal code calling for notice here is the system of what are called " measures of safety," *i.e.* measures taken to protect society from a repetition of a particular offence, such as disqualifying from practice a doctor who has caused injury by a failure in his professional duty, various forms of release under supervision, prohibition of residence in various places to various types of offender and so forth. In this the Chinese code follows primarily the Italian criminal code, and it is noticeable that the system places a very wide discretion in the hands of the judge.

The Chinese Civil and Commercial Code.—So early as the year 1904 an Imperial edict authorized the preparation of a commercial code, and a few months later, the Commission appointed had prepared draft laws on traders and on commercial companies. In 1907 the Law Codification Commission, whose activities have already been mentioned, began its labours, and the work of compiling a Civil Code was seriously begun. At this time the predominating foreign influence was that of Japan, and so, at second hand, of Germany. The reason was not far to seek. At this date Japan " had created a technical legal Japanese vocabulary, translated a number of leading juridical textbooks of Europe and produced a large Japanese legal literature. The Chinese could then find in Japan an adaptation to the Far Eastern mind, in a language closely related to their own, of what represented at the time the most advanced stage of Western scientific juridical science." [1]

Eventually the Commission produced a draft Civil Code in five books, dealing with General Principles, Obligations, Real Rights, Family Law, and Inheritance, closely following the Japanese and German codes. After the establishment of the Republic this was felt to be inadequate, and it was decided to prepare a new draft. This was published in 1925 in Chinese, and the first part, comprising General Principles, was translated into French and English for the perusal of the Extraterritoriality Commission in 1926. It had been decided by the Peking Government to promulgate the parts dealing with General Principles and Obligations in 1926, but the rapid advance of the Nationalists in 1926 and 1927 rendered this impossible, and when the National Government was established at Nanking, the Codification Commission's labours ended, being taken over by the Legislative Commission, a department of the Legislative *Yuan*. A special Civil Codification Commission was set up under the presidency of Mr. Foo Ping-Sheung. Since, however, the new Government was organized upon principles radically different from those of its predecessor, the Commission first obtained the opinions of the Government upon nineteen fundamental points where the Code would be affected by the policy of the Kuomintang, and, having secured these, the 1925 draft was re-examined. By 1929 a new text of Book I was completed, and this, after consideration and amendment by the Legislative *Yuan*, was adopted and promulgated by the Government on May 23, 1929, being supplemented by a Law on the Application of the Book on the General Principles of the Civil Code, promulgated on September 24, 1929.

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[1] *Chinese Civil Code*, English Edition. Introduction, pp. xi–xii.

The Commission then secured from the Central Political Council the enunciation of fifteen general principles governing the Law of Obligations, and another fifteen governing the Law of Things, and assisted by these, it prepared new drafts of Books II and III, which were promulgated in November 1929, and came into force on May 5, 1930. A similar procedure was then followed with regard to Books IV and V, the new texts of these being promulgated in December 1930.

The new code, thus at length adopted, differs in many important respects from the draft of 1925. In some ways it preserves more characteristically Chinese material than the older draft, in others it introduces important new principles derived from the social policy of the Kuomintang. In both particulars it marks a departure from traditional Western development. For example, the 1925 draft contained a number of interpretative provisions, termed "style clauses," designed to supplement documents or transactions in accordance with the presumed intent of the parties. The later Code omits most of these, the draftsmen having reached the conclusion that no uniform formula was possible, on account of the diversity of local practices, which thus are left free to operate in particular transactions. Moreover, in the Third Book, which includes land tenure, the force of local customs is expressly preserved, since it was desired to retain many traditional agricultural customs which had developed out of geographic or economic conditions, so long as they were not contrary to public policy.

On the other hand, the Code is now more properly a Civil and Commercial Code. It had been the intention of the 1925 draftsmen to prepare separate Civil and Commercial Codes. The later Commissioners took the view, however, that the distinction between civil and commercial law in the West was due to historical causes of European origin, and since such reasons did not exist in China, no useful purpose was served by separation. Accordingly the scope of the Code was enlarged to include commercial transactions, *e.g.* there were sections dealing with a number of specific commercial contracts. Not all commercial matters were included, however; and negotiable instruments, insurance, commercial companies and maritime law are dealt with in four special laws promulgated in 1929. Since these are topics where evolution is comparatively rapid, the view was taken that these could be more easily amended if preserved in separate codes.

As far as specific Western sources are concerned, the Commission studied a number of recent Western codes or drafts, and, in particular: the Swiss civil code of 1917 and the revised Swiss code on obligations of 1911; the Soviet family code, 1918; the Soviet civil code of 1922; the Siamese civil code of 1923–5; the Turkish civil code, the Turkish code on obligations, and the Turkish commercial code (all published in 1926); the draft Italian commercial code of 1925; the draft Franco-Italian code on obligations and contracts of 1927.

Whilst the influence of these codes has undoubtedly been considerable, the Chinese Civil Code of 1929–30 is more characteristically Chinese than the draft of 1925, because it expresses a number of fundamental Kuomintang principles. In the words of Mr. Foo Ping-Sheung:

> Occidental legislation is essentially individualistic: it is intended to protect the rights of the individual and to let them freely develop. The traditional Chinese legislation, on the contrary, is *familiar*: it subordinates the activities of the individual to the interests of his family. The new Chinese legislation, based on the Three Principles, racial, democratic and economic, is going one step farther and will have a deliberate social character. Comparing the natural tendency of man towards expansion to centrifugal force, the tendency of society towards cohesion to centripetal force, Dr. Sun foresees the harmonious future of humanity in a combination of the two tendencies, the latter rather taking precedency over the former. The individual must seek his own gratification in such development of his own natural abilities as is most likely to contribute to the general welfare.
>
> The Kuomintang doctrine considers therefore men not as self-contained entities, but in relation to the society which they form. It assigns to them rights and duties only in so far as the exercise of such rights and duties tends to the pacific and orderly progress of the community. It restricts their activities when they would be harmful to the group. Rights and morals in the Kuomintang doctrine are purely social notions, which may eventually be subject to evolution, just as society itself evolves.
>
> Starting from the general principle of a social equilibrium to be preserved between the interests of the individual and the interests of the group, the Kuomintang Party proposes first, in positive legislation, to secure a better and more equitable distribution of wealth among individuals.
>
> The views expressed on this subject are not particular to the Kuomintang. They may be found in the political programmes of all the advanced democratic parties of the world. But the starting point is different. Whilst in Europe and America they try to adjust the opposing interests of different classes of population, the Kuomintang tries to make the notion of social order prevail. In practice the legal forms through which the two conceptions are expressed

do not differ, and in order to execute the intention of the party the Commission had only to combine on that matter precedent derived from various foreign legislations.

A number of illustrations of these propositions are afforded by the Code—for example, the principle that the courts, when passing judgment on civil claims, must take into consideration the respective circumstances of debtor and creditor, and grant time to the debtor for the performance of his obligation; or Art. 442, which provides that "in case the thing leased is an immoveable, either party may apply to the court for an increase or reduction of its rent in proportion to the fluctuation of its value, unless the lease is made for a definite period of time"; or Art. 390, which provides: "In a sale by instalments, if it is agreed that, upon the rescission of the contract, the seller may retain the instalments received, the amount retained cannot exceed an amount representing the rent of the object sold plus damages in case the object sold has sustained any injury." Again, Art. 74 empowers the courts to cancel transactions obviously unfair and concluded through the exploitation of the difficulties or inexperience of one party; whilst Art. 148 incorporates the great principle invalidating the abuse of rights which appears in some Continental codes, and there are a number of other articles applying this principle to particular circumstances. Indeed, the whole of the new Chinese land legislation is based upon this principle.

Books IV and V of the Civil Code deal with family law and inheritance. The first draft of a Code of Family Law was completed in 1910. It closely followed the corresponding sections of the Japanese code, and took little account of characteristically Chinese institutions. Revised drafts were prepared in 1915 and 1925. A Code of Inheritance Law was similarly prepared in 1910, and a revised draft was completed in 1926. These two drafts were quite clearly unsuitable for promulgation under the National Government, for reform of the Chinese family system was one of the main points of the Kuomintang's programme of political and social reform. Accordingly, before undertaking a new draft, the Commission on Civil Law Codification obtained from the Central Political Council of the Kuomintang eighteen decisions upon the guiding principles of the projected legislation. Following this, Books IV and V were completed in November 1930, promulgated on December 26, 1930 and came into force on May 5, 1931. The principal foreign codes consulted upon the subject-matter of these two books were the Swiss civil code of 1907, the German civil code of 1896, the Japanese civil code of 1896, the Code Napoléon and the Brazilian civil code of 1916.

These two books of the Civil Code are from many points of view the most interesting parts of the whole Code, for here the draftsmen were grappling with problems of the first importance and the greatest complexity. Family law tends to be even more tenacious than other branches of the law, and it was here, therefore, that the greatest resistance to change was to be anticipated. Nevertheless, the Kuomintang programme condemned many of the traditions upon which Chinese family law rested, and many innovations were contemplated. These innovations owe a good deal to the infiltration of Western ideas into China during the last half-century, but here again, there has been no indiscriminate borrowing. The Kuomintang has taken certain Western ideas, and from these, with native Chinese institutions, has produced something new, with a character of its own.

It has already been pointed out that Chinese law in the past was based upon the conception of the solidarity of the family. Down to the last days of the Imperial régime, China was regarded as divided into a number of clans, bearing a common patronymic and claiming descent from a common ancestor. The unit of society was thus the family, and duty to the family took precedence over duty to the State. This is strikingly illustrated by the two following anecdotes, preserved in Chinese classics and representing the traditional Chinese point of view :

> In the state of Ch'u there was a certain upright man, who, when his father had stolen a sheep, denounced him to the official. But the Prime Minister condemned him to death, judging that he had acted in an upright manner towards his prince, but crookedly towards his father, and that in return, therefore, he should be punished. Looking at it from this point of view, the subject that is upright towards a prince is a wicked son to his father.
>
> There was a man of Lu, who followed his prince to the war and who in three battles ran away thrice. When Chung-ni (Confucius) asked him the reason for that, he replied : " I have an old father, and when I die there is nobody to take care of him." Chung-ni regarded this as an act of filial piety, brought him to the fore and presented him to the prince. Looking at it from this point of view, a father's filial son as a subject turns his back on the prince.[1]

Only one school of Chinese thought, known as the School of Law, dared to challenge this concept. Obviously, therefore, the Kuomintang, in its reforms, was here dealing with something fundamental, and even Dr. Sun Yat-Sen trod cautiously. His doctrine was that upon the primitive organization of the family and clan must be superimposed the conception of the unity of the people, joined by the tie of the promotion of the common prosperity. The old organization remains, therefore, but for the former conception of the interest of the family as the dominating interest is substituted the interest of the nation. This necessarily implies the relaxation of the rigidity of family ties in a number of instances.

One important by-product of the clan system was the evolution of a class of clan dependents—parasites, as the social ethic of the Kuomintang dubbed them. By immemorial custom the head of a family supported those members of his clan who were unable to support themselves or, if the Kuomintang's view is accepted, lacked the will to support themselves. To them were assigned any available occupations in agriculture, industry or commerce, according to the occupation of the head of the family, and without regard to the merits of the individual himself. This system was repugnant to several Kuomintang ideals—to the conception of the individual as a being entitled to maximum self-development, and also to the conception of the State's obligation to provide work of some kind for its citizens ; and the new family code therefore seeks to weaken these ties as much as possible, encouraging the former dependent to self-reliance.

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[1] *Han Fei-tzu*, ch. 19, par. 49, p. 10 ; cited Duyvendak, *The Book of Lord Shang*, p. 115. Much valuable information on Chinese family customs is collected in *The Family in Classical China*, by H. P. Wilkinson (1926).

Such an undertaking implies a social revolution, and another side of the same movement may be perceived in the determined attempt of the Code to place men and women upon a footing of equality. The Chinese group-family was essentially patriarchal, succession being confined to those claiming descent through males of the clan. This necessarily prevented the woman achieving any independent status of her own, whilst the desire to perpetuate the family gave rise to a system of legalized concubinage. The new Civil Code seeks to break down this system. It ignores the ancestral cult, and replaces agnatic by cognatic succession. Sons and daughters now share the estate equally on the father's death intestate, and in order to prevent the exclusion of daughters by will, the Code has instituted the system of the " legitimate portion," which finds a place in all Continental systems based on Roman law.

A blow is also struck at old-established custom by the provision in Art. 1117 that the head of the household's duty to support his impoverished relations is confined to those who have no means of support and cannot earn their own livings. Furthermore, the whole conception of marriage is changed. It is no longer a treaty between two families, but a union based on the free consent of the parties. The consent of relatives is required only where the parties are under age (Art. 981). Paternal power has also been greatly reduced in importance. It is not mentioned by name in the Code, and its extent now is simply on the same footing as it exists in the West, *i.e.* rights and duties in relation to the protection, education and support of children under age. Concubinage has been deprived of legal consequences, and if either party to a marriage cohabits with a third person, this gives rise to a right to claim divorce (Art. 1052). Legitimation of a son by the subsequent marriage of the parents now exists (Art. 1064) and a father can also legitimate his children born out of wedlock by deliberate recognition, or by supporting them during infancy (Art. 1065).

As a result of the admission of women to rights of succession, a woman may now have a separate estate, and the Code introduces the Swiss system of " union of goods " to regulate the position during marriage in the absence of special agreement. Under this, the woman retains as her separate estate property for personal use, the product of her labour and certain other types of property.

THE RESTATEMENT OF THE LAW OF TORTS.

[*Contributed by* C. J. HAMSON, ESQ.]

Account of the Work.—The volumes under review[1] are the work of a number of very learned persons who discussed and examined their opinion over a period of eleven years, holding for that purpose thirty-eight conferences of a total duration of over one hundred and fifteen days. Each chapter has been laboriously drafted and redrafted by the Reporter and his committee of advisers, who were primarily responsible for the formulation. Among this committee of about twelve are to be found some of the most famous names of the American legal world, including in particular the person specially well known in England, Mr. Justice Cardozo, formerly Chief Judge of the New York Court of Appeals and later a member of the Supreme Court of the United States, who served for nine years as a very active member. Even so, the draft, before publication, was circulated to and discussed by not only the Institute's Council, which is composed of equally famous persons, but also the individual members of the Institute and of the law schools and the profession generally, and it was revised and reconsidered in the light of the innumerable suggestions and of the criticisms in writing thus made. It is only as finally approved by the Reporter and his advisers, by the Council and the members of the Institute that the Restatement was, after eleven years of study, ultimately published.

It would thus be hard to exaggerate the amount of the work and the meticulousness of the care which have gone to form this restatement. When it is added that the Reporter for the two volumes under review was Prof. Francis H. Bohlen, a person to whom every student of the law of Torts both here and in the United States is greatly indebted and who has spent a lifetime in the study of this branch of the law, the reviewer may perhaps be pardoned for regarding his review as a somewhat rash and impertinent undertaking.

[1] *Restatement of the Law of Torts :* as adopted and promulgated by the American Law Institute. Vol. I : " Intentional Harms to Persons, Land and Chattels," pp. xxxii + 730 Vol. II : " Negligence," pp. xxxi + 731–1338. Pagination continuous through both volumes. Separate index in each. (American Law Institute Publishers : St. Paul, 1934. $12 the two volumes.)

The American Law Institute has already in addition published the following volumes : *Contracts*, 1932 (two volumes, $12) ; *Agency*, 1933 (two volumes, $12) ; *Conflict of Laws*, 1934 (one volume, $7·50) ; *Trusts*, 1935 (two volumes, $12) ; *Law* of Property, 1936 (two volumes, $12). For a review of the Contract volumes in this *Journal*, see Professor Winfield, vol. xi, pt. iv, p. 179 ; vol. xviii, pt. iv, p. 179.

In view of that labour it is desirable, before attempting any criticism, to state fully both the purpose of the work and the manner of its execution in these two volumes.

The purpose is well stated by the Institute itself through the person of its Director[1]:

> The object of the Institute in preparing the Restatement is to present an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years.
>
> The Institute recognizes that the ever-increasing volume of the decisions of the courts, establishing new rules and precedents, and the numerous instances in which the decisions are irreconcilable, taken in connection with the growing complication of economic and other conditions of modern life, are rapidly increasing the law's uncertainty and lack of clarity; and that this will force the abandonment of our common-law system of expressing and developing law through judicial application of existing rules to new fact combinations and the adoption in its place of rigid legislative codes, unless a new factor promoting certainty and clarity could be found.
>
> The careful restatement of our common law by the legal profession as represented in the Institute is an attempt to supply this needed factor. The object of the Institute is accomplished in so far as the legal profession accepts the Restatement as *prima facie* a correct statement of the general law of the United States.
>
> The sections of the Restatement express the result of a careful analysis of the subject and a thorough examination and discussion of pertinent cases. The accuracy of the statements of the law made rests on the authority of the Institute. They may be regarded both as the product of expert opinion and as the expression of the law by the legal profession.

The scheme adopted would best appear by a summary description of the contents of the volumes. The first volume, on Intentional Harms, consists of 280 sections. Each section begins with one or more paragraphs in heavy type, setting out a proposition of law with great formality, in language appropriate to a statutory enactment. There follow paragraphs of comment in normal type, running frequently to a number of pages and often containing "Illustrations." These illustrations are submitted as purely hypothetical: some indeed (s. 281. i) are merely fantastic; and they remain hypothetical even when the reader discerns in them the facts of a decided case. Very infrequently the Institute adds a *Caveat* in small print, usually in the form that it expresses no opinion upon a particular point. No reference at all is made either to any legal literature other than the Restatement itself, or even to any decision of any court whatsoever; and there are no footnotes.

These 280 sections are very unevenly distributed into eleven chapters—Chapter 11, for example, containing two sections, Chapter 4 fifty-eight. A chapter sometimes is divided into Topics, with further subdivisions into Titles and Subtitles; and may be preceded by an introductory note, usually indicating the relation of the particular chapter to the rest of the Restatement or to the body of the common law.

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[1] Preface, pp. viii and ix.

Volume II, on Negligence, consists of 223 sections divided into eight chapters. Almost every chapter is again divided into numerous Topics and Titles.

It must be added that these two volumes are two divisions merely of the proposed Restatement of the Law of Torts. The other divisions contemplated by the Institute include (i) Liability without Fault, (ii) Defamation, (iii) Deceit and Malicious Prosecution, (iv) Harms to Contract Relations, (v) Harms to Domestic Relations, (vi) Legal and Equitable Reliefs against Tortfeasors; and we are informed in the Preface that the full Restatement will be contained in not less than four or five volumes.

Criticism.—The reviewer's first reaction to this Restatement of the Law of Torts was one of puzzled bewilderment: was this the common law he was accustomed to read in Pollock and Salmond? The transformation is momentous.

It is no doubt improper to compare the task of English writers with that of the Institute; for they are concerned to state the law of substantially but one jurisdiction and that highly self-contained, whereas the Institute is concerned to state, or rather to refashion into coherence, the law of some fifty jurisdictions which have shown marked eclectic propensities and have been subjected not only to continuous cross-influences amongst themselves but to the pressure of the great unifying and directive law schools in the country. How would the English writers fare if the volume of the reports with which they had to cope was multiplied by fifty, if those reports revealed contradictions in comparison to which the contradictions of the English courts would be the plainest concordance, and if the doctrine wherewith the reports were overlaid by its mere mass reduced into insignificance the comments on the *Corpus Juris*?

When once he has appreciated the Institute's task the English reader should more properly perhaps be surprised at its accomplishment at all rather than at the particular form in which it has in part been accomplished; but his surprise would no doubt remain.

It is primarily perhaps that form which induces his surprise. The language of a statute is not usually considered the best means of a plain statement. One of the Institute's laudable objects is to avoid legislative enactment; yet, so far as interpretation is concerned, the Restatement presents at least as great difficulty as an Act of Parliament. Each section is drafted in a style appropriate to a code; and the attempt to construe together half a dozen sections—let alone the relevant sections out of the present 500 and the threatened 1,000—is a very daunting experiment. Not that the experiment normally fails, for the Restatement is carefully drawn; but the verbal accuracy attempted, the particularity detailed and the resulting involution would appear to a common lawyer in England both irritating and highly unnecessary. The Restatement seeks to impose upon the law of Torts a much higher degree of rationality than the subject is capable of supporting. The attempt would confirm Aristotle in his opinion that such a proceeding, so far from being scientific, merely makes for confusion : it is ἀπαίδευτος of an historian to try, in his history, to be a logician.

A great teacher of the law has said that the law of Torts should be written on two sheets of paper. If that is a somewhat Utopian expectation, yet certainly the English courts have recently lent towards an increasingly simplified and general formulation of the fundamental rules of Tort. The Restatement—*heu quantum distat ab illo*—tends very much, and unwisely, in the opposite direction. The detail in it obscures the main principles. Of the 500 sections many are necessarily concerned with comparative trivialities ; yet little distinction is made between the trivial and the important. When the detail has no finality—as here it has not, for the opinion of the Restatement is not a binding decision—its presence, if not otiose, militates greatly against the clarity which was one of the Institute's main objects. The Restatement is μέγα βιβλίον, and in this respect its amplitude is μέγα κακόν. For, in the absence of legislative authority or a common tribunal, unity in the chaos of American law seems capable of being achieved only by a concise statement of those principles which would in fact be accepted as binding in the majority at least of the jurisdiction. Those principles do not appear with any clarity from a perusal, however careful, of these volumes : mainly because of the form adopted and the precision attempted.

Besides the form, perhaps because of it, there are two other factors which contribute to the difficulty and diffusion of the Restatement. First, repetition. There being no " General Part," such as Sir Frederick Pollock's chapter on General Exceptions—for the definitions in Chapter 1 of the Restatement are circumlocutions purely—substantially the same defence (which, no doubt more accurately but probably unnecessarily, the Restatement terms a " privilege ") is repeated, sometimes defectively, as regards each " interest invaded." Thus the defence arising from consent is dealt with first in 14 sections in Ch. 3, so far as concerns " Intended Invasions of Interests of Personalty," then in 9 sections in Topic 1 of Ch. 8, so far as concerns " Privileged Entries upon Land," and then in 7 sections in Topic 1 of Ch. 10, so far as concerns " Intended Invasions of Interests in Present and Future Possession of Chattels." But Ch. 10, Topic 1, is not intelligible without Ch. 3 ; and although something is added, much is expressly repeated and an indefinite amount would seem to be repeated by implication. Moreover, consent is explicitly mentioned as a defence in sections 13, 18 and 21, and a glance at the Index reveals further scattered references in Vol. I. Vol. II also deals with a cognate topic, " Assumption of Risks," which no doubt will also further be discussed in Vol. III. Again in Ch. 4 the " privilege " to use force is set out in Topic 4 (which deals with forcible entries upon land) in terms which are often identical with those used in Topic 5 (which deals with the forcible retaking of chattels). In both these cases, and in many others, it would have been at once more concise, and a good deal clearer, if the law dealing substantially with one point had been gathered together in one place and if such differences as there may be in its application to particular " interests " had been expressly noted as differences.

The second factor contributing to diffusion is the division taken between Intentional and Negligent Wrongdoing. Vol. I does not deal exclusively (to lapse into the Restatement's language) with interests which at law are protected only from intentional invasions—if that were so, the division might be justified ; it deals in intentional invasions of interests which *may* also be protected from negligent or even accidental invasions. Intention is not expressly defined in the Restatement ; it appears to be distinguished both from express malice on the one hand and from mere volition upon the other, and to refer to the state of mind of the actor or of the reasonable man as that actor. But the state of mind of the defendant is often unimportant, especially when the interest is protected as much from negligent as from intentional invasion. Commonly the plaintiff would be willing to give the defendant in such a case the benefit of any doubt as to his state of mind. The importance of the difference between intention and negligence, however absolute in logic, is not in law commonly such as to warrant the strict distinction taken by the Restatement. The difference commonly is at least less important than the difference between trespass and case. To accept the one so wholeheartedly while very properly condemning the other seems an artificially doctrinaire proceeding. And the practical result is that when in Vol. I an illustration informs us that there is no liability, this *may* mean merely that there is no liability under the particular doctrine discussed, whatever may be the effect of the doctrines which deal with a similar situation but which fall to be discussed in Vols. II–V. Such an arrangement scarcely makes either for clarity or for conciseness. And the division proposed to be made in Vols. II and III between Negligence and the rule in *Rylands* v. *Fletcher* threatens to be even more formal and distracting.

The method of presentation accordingly makes it important to construe together and to contrast sections of the Restatement which may be widely separated. This is rendered more difficult by the occasional infelicity and caprice of the drafting. The terminology varies, but the variation may or may not—quite arbitrarily—denote a variation of meaning. Thus in ss. 13, 18 and 21, which deal with " Battery : Harmful Contact," " Battery : Offensive Contact " and " Assault " respectively, the variations in clause (*a*) are merely capricious ; but the variation in clause (*b*) is intended to signify a difference in substantive law. Again in ss. 167 and 252, which deal with consent as a defence to trespass to land and chattels respectively, the terminology varies widely, but probably—though here it is hard to be sure—conceals an identity of meaning if s. 253 is taken into account. In ss. 171 and 254, dealing with the same topic, the variation in clause (*a*) is capricious, in clause (*b*) deliberate. Another example of idle variation or unnecessary repetition may be found in ss. 59 and 175.

The terminology itself, apart from the variations, would strike a common lawyer in England as odd: he would certainly have to learn it as a special language. Even though the Institute may justify its claim that it has not invented new words and that it uses words in one, and only one, of the senses familiar to the profession in the States, the terminology seems perhaps unnecessarily elaborate. The elaboration does not make for clarity, quite apart from the occasional failure of the technique due to human frailty. The Restatement is not exempt from such frailty. For example, "injury" is carefully defined in s. 7 to distinguish it from "harm": in s. 9 "harm" is used where "injury" is intended. If no confusion arises, it is because the care of the definitions, here as often elsewhere, though encumbering was superfluous.

Granted now that the reader overcomes the difficulties and masters the contents of these books, what will it profit him in his profession? This Restatement states a law that never was upon land or sea. It purports to state the "general common law" of the United States. There does not appear to be any such law in actual existence. It does not even state what the Reporter and his advisers believe that that law ought ideally to be: it is obvious that they would often state it more largely and coherently if they could. It represents at best perhaps that minimum of desirable law which the Reporter and his advisers believe might, without too much dislocation, be adopted in any common-law state. But even that adoption would be subject to important local deviations. The Reporter and his advisers appear to hope that these deviations, however important, may in course of time come to be treated as deviations. To the extent only that this hope is realized will the Restatement have practical value; and the hope would appear somewhat large, so far at any rate as the practising profession is concerned. In the course of his business to master an apparently hypothetical norm for the purpose merely of discovering which of his actual rules (which must themselves be found elsewhere, with sufficient labour) conform to that norm and which deviate from it would require a much higher degree of pure love of abstract knowledge than may safely be expected of an English practitioner. It may be that his American brother possesses the requisite degree; it may be that in the chaos which the Institute's Preface postulates as reigning in American law, the profession will be the readier there to fly to any norm, however hypothetical. It would certainly be desirable that the Restatement should be recognized as the norm, if that is the only norm to be had. But until it is so recognized, it appears to an English reviewer to be the law of yet another jurisdiction which, if more enlightened and coherent, is somewhat more remote and doctrinaire than that of the existing states. It is the law of the State of Ames, a powerful jurisdiction which has bred more and greater lawyers perhaps than any other; but it is no more than the law of that state.

The remoteness of the law of the Restatement is emphasized by the Institute's decision to rely upon its own authority exclusively. That decision has been followed, as we have seen, so wholeheartedly that there is no reference whatever to any decision of any court or to any legal literature other than the Restatement itself. We are indeed by that decision spared the elaborate citation of authority which is apt to encumber an American textbook. But it is a grave defect that no attempt whatever is made concisely to indicate to what extent in which jurisdictions the Restatement departs from the law there obtaining. It is impossible, from the Restatement itself, to determine in a particular case whether we stand upon the comparatively firm ground of a mass of concurring decisions, or whether we are making a perilous choice between two or more equally balanced but conflicting opinions, or even whether we are trusting solely to the Institute's rationality without, or peradventure against, the opinions of the courts. The Institute, it is true, is publishing in a separate volume for each state an annotation [1] appropriate to that state. Yet even so, without search through every volume, it is impossible to estimate the comparative popularity [2] of the Institute's law; and we shall be without the Institute's assessment of the importance, in the particular case, of the difference between the law of the Institute and that obtaining in the relevant jurisdiction.

However, apart from immediate practical value, the Restatement may become important as a textbook in the law schools. As a textbook, which the Institute does not primarily intend it to be, it suffers from the defects we have examined. But if the American teaching profession, by a great self-denying ordinance, accept it as *the* book from which to teach, if the teaching is by way of comment upon the text, it is likely in the long run, and by such a course more surely than in any other way, to achieve that unity and coherence of the common law which is so greatly to be desired not only by the American practitioner, but by his academic brother as well here as across the seas. Yet one may regret that the book to be accepted, if any is accepted, is so difficult and prolix; and it would be improper to minimize the greatness of the self-denial required of the American treaching profession.

In mitigation of the captiousness of this review, it must be repeated and emphasized that an English reviewer is singularly ill-suited to judge of the probability of success for the Restatement. Divest himself as he may of his prejudice, he still must assess that probability in the light of conditions familiar to him. But the book is not designed to meet those conditions. We here still are blessed with a common law which is *relatively* cognoscible: the American lawyer apparently is not so blessed. The Restatement is to us still a dreadful warning of what may await us; to him it may be the necessary remedy for an overmastering evil. However prolix, difficult and over-elaborate it is to us, to him the Restatement may seem *comparatively* simple, easy and short. It is highly unlikely that a book resembling the Restatement would find any favour to-day with either the practising or the teaching profession in England. It would be improper to infer that the same is true of the United States. And it is exclusively the reception accorded to this book by the profession in the United States which will determine its failure or success.

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[1] Several volumes are already published, price $3 or $4.

[2] The Institute publishes yearly a volume showing how far the Restatement has been cited or approved by the courts. Indispensable as such a volume is, it would perhaps have greater value if some attempt were there made to assess the comparative importance of the citations.

Moreover we cannot sympathize too much with the Institute's object —to render immediately accessible to ourselves and to the world the wealth of the common law—or with the difficulty of the task in the particular instance. It should be remembered that of all the branches of the common law, the law of Torts is by far the most intractable. To speak slightingly of the Restatement because it has not achieved pellucid clarity in this field is no doubt much like blaming a geometer for not exactly squaring the circle. Indeed it may properly be concluded that it is impossible to reduce the law of Torts into an orderly statutory statement if Professor Bohlen has not completely succeeded in the attempt.

Finally it should be noted that this review has attempted to judge of the Restatement with reference only to the aims which the Institute proposed to itself. If the Restatement falls short of those aims, that does not mean that it has not incidentally achieved a very great deal indeed. It is difficult to exaggerate the value of these books as an illuminating comment on any subject covered by them; they fully confirm, if confirmation is necessary, Professor Bohlen's immense learning as a critic, his authoritative sagacity as a master, of the law of Torts. It would be out of place here to record even the more striking opinions formulated in the Restatement. The careful reader is left with innumerable new ideas; distinctions are drawn which we have long required; what in England may be treated as scarcely known novelties here appear as established principles; remedies for which we must still look to the future here are in full maturity; and upon any disputed topic, indeed upon topics which have not yet occurred to us, we are sure to find some comment offered with all the sureness of authority. Let it suffice that Dr. Stallybrass, the editor of *Salmond on Torts*, has called these books "an inexhaustible quarry": a quarry moreover in which the labour of Professor Bohlen and his advisers has hewn and made ready those blocks of stone which lesser men may use in the edifice of the law.

THE NEW GERMAN COMPANY LAW AND ITS BACKGROUND.

[*Contributed by* F. A. MANN, ESQ., DR. JUR. (BERLIN), LL.M. (LOND.)]

Reform of the Law.—The succession of war, inflation, recovery and depression to which Germany was exposed in the period of about two decades since 1914 could not fail to affect deeply and to transform the aspect of German Company Law which, mainly founded upon an amending statute of 1884 formed part of the Commercial Code of 1897 (ss. 178–319).

No doubt certain of the economic phenomena arising in later times could not have been anticipated when the Code was drawn up. Thus the Code did not deal with concerns and trusts, cartels and combines, subsidiary and holding companies; it gave little or no adequate place to the new methods of financing, such as intermediate forms of shares and bonds, to the effects of modern tax and labour laws, the influence of public bodies on private ventures, the rise of nearly omnipotent Big Fives; it did not know of the methods by which companies' administrations were able to protect and fortify their position; it did not provide for proper auditing of accounts.

These structural changes,[1] of which but a few of the most important have been mentioned, led to the necessity of pressing new forms into an old frame not made to fit them. It is therefore not surprising that a tension between the law and the facts of economic life arose, which though sometimes overrated, undoubtedly created difficulties for courts and practitioners, and there were many—too many—who felt entitled to co-ordinate, not to sub-ordinate, a "living Company Law" to the enacted law and who did not shrink from looking to practice, to "life," the "Macht des Faktischen," to find justification for acts and methods irreconcilable with the letter and the spirit of the existing and perhaps still workable law.

Investigation of this separation between enacted and "living" law was one of the tasks of the Committee set up for the purpose of "examining the state of production and distribution in the German economy." A sub-committee of this important body inquired into the changes of economic organization and, consequently, into the changes in the legal position of individual companies and concerns. The sub-committee received five written opinions of considerable weight and heard 41 experts. The result was embodied in a report (1930) in which it was stated that a reform of Company Law had to envisage the task " of assimilating the law to the recent economic development, to eliminate obsolete provisions and to enact provisions regulating economic novelties in so far as it is required in the interests of the community, the companies and the shareholders."

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[1] See *e.g. Die Strukturwandlungen der deutschen Wirtschaft*, 2 volumes (1929), edited by Harms. A great deal of factual material is also collected by Flechtheim-Wolff-Schmulewitz, *Die Satzungen der deutschen Aktiengesellschaften*, and by Haussmann, *Unternehmenszusammenfassungen.*

The demand for a comprehensive reform of Company Law had, however, been raised long before the publication of this report. It first received semi-official recognition in 1926 when the 34th Meeting of German Jurists (*Deutscher Juristentag*) appointed a Commission to study the problem. After the publication of its report in 1928 the Reich Ministry for Justice caused a further inquiry to be made by submitting a questionnaire to a great number of persons, corporations, institutions and associations, the more important replies to which were published. In 1930 there followed the publication of a first and in 1931 of a second Draft Act, both prepared by the Reich Ministry for Justice, but never submitted to Parliament. Shortly before the second Draft Act was published, two decrees were made in September and October 1931, by which, in anticipation of a more comprehensive reform, certain questions of outstanding importance brought to the forefront by the economic crisis of July 1931 were dealt with. It was at this stage that an article in this *Journal* acquainted English lawyers with certain aspects of German Company Law and its reform.[1]

Up to that moment it seemed that the reform movement concentrated on three problems: improvement of more or less technical details in various connexions; provisions for matters hitherto unknown to the enacted law; regulation of certain transactions and methods the legitimacy or illegitimacy of which was in dispute. But when in 1933 National Socialism gained power, a fourth question was added which was soon to have paramount importance and shifted the whole problem to a totally different line. In accordance with the general ideas of the totalitarian state it was thought necessary to " carry into effect National Socialist principles within the sphere of economics."[2] This led to the consideration of questions of a much more fundamental character, namely as to whether and, if so, under which circumstances limited companies should on principle be allowed in a National Socialist State so as to correspond to the ideas underlying its foundation and activities.

The newly founded Academy for German Law appointed a Committee to inquire into this question. Its recommendations were laid down in two reports of April 1934 and April 1935.[3] Shortly afterwards the President of the Reichsbank, Dr. Schacht, intervened by giving a lecture to the members of the Academy in the course of which he made a strong plea in defence of the limited company as such, and of some of its essential features.[1] Finally, in January 1937 the new German Companies Act was published which came into force on October 1, 1937, and about which Reich Minister Frank made the following observations[2]:

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[1] Rosendorff, *Journ. Comp. Leg.*, Third Series, vol. xiv, p. 94; vol. xv, pp. 112, 242.

[2] *Official Reasons*, Introduction.

[3] *Zeitschrift der Akademie für deutsches Recht*, 1 (1934), 20 *sqq.*; 2 (1935), 247 *sqq.*

> It remained the privilege of the National Socialist movement to effect a change. In this connexion, too, it did not confine itself to individual technical improvements, but it aimed at and reached a fundamental reform of the law. As President of the Academy for German Law I appointed in 1934 a Committee for Company Law and put it to the task of developing the principles of a new German Company Law by a fertile synthesis between the principles of National Socialism and the requirements of a settled German economy. As the Official Reasons (*Amtliche Begruendung*) make clear, the new Act has been prepared on the basis of the two reports rendered in 1934 and 1935 by the Committee of the Academy which consisted of prominent members of the party and practice.

In the following pages no attempt will be made to treat the numerous new provisions of the Act of 1937 which relate to matters of detail; some of these new provisions are new, others merely put on a statutory basis what has hitherto been current practice, especially the practice of the courts, others had in substance already been intended by the Draft Acts of 1930 and 1931.[3] Nor is it intended to cover the same ground as that to which Rosendorff directed his efforts in this *Journal* some years ago; the changes brought about by the decrees of 1931 have on the whole been maintained and incorporated into the new Act and do not need to be reconsidered.

The purpose of these investigations will be rather to scrutinize the general ideas leading to and underlying the new Act and to consider their realization by it. In the latter connexion some of those problems which, in the reform movement before 1933, had a really important place, and their solution by the new Act, will have to be considered.

Commercial Code of 1897.—The German Company Law as incorporated in the Commercial Code of 1897 did not profess to represent or to give expression to the social or ideological principles of a distinct school of thought. No doubt, the trite saying that the inner life and organization of a company is not so very different from that of the State enables us to distinguish some features of the former German Company Law which show it to have been the creature of a liberal age devoted to a more or less complete parliamentary rule and control. Thus wide powers were conceded to the shareholders assembled in general meeting ; the principle was expressed by the well-coined phrase that the general meeting of the shareholders is the " supreme organ of the company " to the decision and control of which the directors were subject. It is, however, unnecessary and would be misleading to dwell on further examples, because it is clear that, whatever explanation of the one or the other provision might now be offered, the authors of the Commercial Code were not openly influenced by any other idea than the desire to find what they considered *aequum et bonum*, and to give expression to it in the provisions of the Code. They did not aim at a rigid basis which should shape the legal character of a company limited by shares. They examined each question on its merits, and they certainly did not intend anything but to produce a good company law. By this method they were able to produce the legal frame of a limited company which did not essentially differ from that adopted in other countries[1] and which, in accordance with the unpolitical intentions of its authors, came up to the modest expectation of being workable.

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[1] *Zeitschrift der Akademie für deutsches Recht*, 3 (1936), 35 *sqq*.

[2] Reproduced in *Juristische Wochenschrift*, 1937, 497.

[3] Most of these provisions aim at clarifying and facilitating certain methods to alter the structure of the company or to obtain finance; thus the Act contains detailed provisions relating to the issue of shares carrying no rights to vote (ss. 115 *sqq*.), to a conditional increase of capital (ss. 159 *sqq*.), to an authorized increase of capital (ss. 169 *sqq*.), to the issue of convertible bonds (s. 174), the simplified reduction of capital (ss. 233 *sqq*.), the merger of companies (ss. 233 *sqq*.), the transfer of the whole of the assets (ss. 253 *sqq*.), profit sharing-agreements (s. 256), the transformation of limited companies into other forms of corporative bodies (ss. 257 *sqq*.). One may also mention that in future hidden reserves cannot be put aside under the head of fictitious liabilities or by a set-off: s. 131 (5). On the problem of hidden reserves which on principle remain permissible, see Flechtheim in Düringer-Hachenburg's *Kommentar zum Handelsgesetzbuch*, vol. iii (1), s. 213, note 19; and Pinner, to whom this question is much indebted in Staub's *Kommentar zum Handelsgesetzbuch*, vol, ii, s. 260*b*, note 10.

This absence of *a priori* principles was bound to come to an end when during and after the Great War people began to take stock and to reconsider their problems fundamentally. This was a general occurrence which deeply affected Jurisprudence, State Philosophy, Law in general, and Company Law in particular, and, though this is now history and new ideas have gained ground since 1933, it will appear that it is indispensable to make a few observations on their predecessors within the limited sphere of Company Law.

Legal Theory of the " enterprise as such."—In 1918 Walter Rathenau published a pamphlet under the title *Vom Aktienwesen, eine geschäftliche Betrachtung*. In this book, which, as its title suggests, contained reflections on matters connected with limited companies from a business and not a legal point of view, the stock-phrase appears for the first time which was to enable docile disciples to develop a legal theory : Rathenau mentions that it could not be allowed for the Deutsche Bank suddenly to go into voluntary liquidation, because, notwithstanding the control of the majority of the shareholders, there was a public interest to preserve a venture which had become an institution ; he thus asserted the existence of a distinct life of the " *enterprise as such*." On the basis of this catchword a legal theory of the " enterprise as such " was developed during the following years. The essence of this theory is not easy to grasp ; its supporters differ in their arguments, objects and definitions. But if one may follow its most indefatigable champion, Oskar Netter, and take as a basis his last publication summing up the programme [1] the substance seems to be this: in the course of the life of a limited company three groups of interests may oppose each other, namely the interest of the shareholders whose individual interests may again differ, the interest of the company as such and the interest of the public in the existence and the development of the company. This leads to the question—which interest is to prevail in case of a conflict. The answer given by the theory of the " enterprise as such " is that the enterprise as such is an independent legal object, the interest of which is the principle to which precedence over all other interests is due and which pervades the life of the company.

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[1] See the Comparative Surveys by Hamburger, *Rechtsvergleichendes Handworterbuch*, ii, 112 ; and by Hallstein, *Die Aktiengesetze der Gegenwart* (1931).

These few words will suffice to make it clear that this is an extraordinarily comprehensive and important principle which is capable of transforming the prevailing views of the character of a limited company and which, in its general contents, is not necessarily confined to German Company Law.

The theory of the " enterprise as such " has, it is believed, two different sources and, accordingly, two different ends.

In the first place it aims at a restriction of individualistic control by shareholders. In this respect the theory to a certain extent relies on a number of socialistic ideas which in Germany developed during the war and which found their way into the Constitution of the Republic of August 11, 1918, and into subsequent legislation. The Constitution is full of the spirit which (*e.g.* in Art. 153) is summed up by the principle: " Ownership produces obligations. Its use shall also be service for the common weal." This principle has impressed itself on many spheres of the law, and one cannot help feeling that it is one of the greatest achievements of the labours of the post-war courts and jurists that they have been able to recognize the inner connexion between individual right and obligations towards the community; it suffices to refer to the development of the principle of good faith which has created what may be called a German law of equity [2] or to the series of Supreme Court decisions restricting the abuse of monopoly rights [3] or to the transformation of the conception of ownership in the law of real property.[4] The fact that, in respect of company law too, an attempt was made to limit individual power falls, therefore, in line with a general development.

But it is an entirely different question in favour of which interests individual rights are to be restricted. The answer given by the theory of the " enterprise as such " shows its kernel: according to it, the decisive factor is the interest of the enterprise. This answer practically involves supremacy of the Board. Supremacy of the Board had already become a fact in the life of German companies and it has now received its theoretical blessing. No doubt, according to the " enterprise as such " theory the Board itself is subject to the interest of the company. But as it is the Board which, in view of the necessarily reserved supervision by the courts[1] determines the interests, it is in fact in control over them.

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[1] *Zur aktienrechtlichen Theorie des Unternehmens an sich, Festschrift für Albert Pinner* (1932), p. 507.

[2] Werner in Staudinger's *Kommentar zum Buergerlichen Gesetzbuch*, notes to s. 242.

[3] Gadow, in Staub's *Kommentar zum Handelsgesetzbuch*, iii, pp. 49–52.

[4] Wolff, *Sachenrecht* (1932), pp. 2, 155, 157, 161.

This theory, like many other theories, though accompanied by many errors, misstatements and exaggerations, yet contains a grain of truth. The interest of the company is clearly a factor which may be a guide for deciding many questions and to which the courts in all countries have in fact given due weight in the apposite connexions.[2] But it is clear that the interest of the company as opposed to that of the majority or the whole of the shareholders can neither control everything and anything, nor solve all conflicts. There is, however, no point at which the theory of the " enterprise as such " would be prepared to stop. Where the law entitles a shareholder to oppose a resolution by bringing an action,[3] or where it allows a minority of the shareholders to demand an adjournment of the meeting,[4] such rights are denied unless their exercise complies with the interest of the company[5]; moreover, the fulfilment of statutory formalities and even the protection of creditors are said to be subject to the company's interest.[6] While such eccentricities should not be overrated, it may be useful by more practical example to show the strange results which the theory inevitably produces. In recent[7] decisions of the Supreme Court the principle was developed that a majority of the shareholders cannot be permitted to pursue its exclusive advantage, extraneous to the company, to the latter's detriment, *e.g.* to carry by its predominant voting power decisions selfishly aiming at overthrowing the enterprise or hazarding its prosperous future.[8] In other words,[9] " the right to decide by a majority vote and, thereby, to dispose of the financial interests of the minority in the company, involves the obligation for the majority to have regard to the justified interests of the minority and not to curtail them unduly." While these principles obviously aim at the protection of the minority and have never been applied otherwise, the theory of the " enterprise as such " shifts their emphasis by asserting and demanding that " the exercise of the majority rights must accord with the interest of the enterprise,"[1] *i.e.* of the Board, and it would therefore invalidate a resolution which violates the interests of the enterprise even though it was approved by an unanimous vote.

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[1] See Nussbaum, *Juristische Wochenschrift*, 1932, 2585.

[2] Reference may be made to the well-known words of Lord Lindley M.R., in *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656, 671 ; and see *e.g. Sidebottom* v. *Kershaw Leese & Co.*, [1920] 1 Ch. 154 (C.A.) ; *Shuttleworth* v. *Cox Bros. & Co. (Maidenhead) Ltd.*, [1927] 2 K.B. 9 (C.A.). These and other decisions aiming at the prevention of fraud on a minority express the same rule as that laid down by the German Supreme Court.

[3] S. 271, Commercial Code ; ss. 195 *sqq.* of the new Act.

[4] S. 264, Commercial Code ; s. 125 (7) of the new Act.

[5] Netter, *loc. cit.*, p. 598 ; in so far as voidability is concerned this view was rejected by the Supreme Court : RGZ 145, 336, 338 (November 13, 1934) ; but see RGZ 146, 385, 395 (January 22, 1935).

[6] Netter, *loc. cit.*, p. 600.

[7] But see the early decision in RGZ 68, 235.

[8] *Juristische Wochenschrift*, 1931, 2958, 2961.

[9] RGZ 132, 163 (March 31, 1931).

The theory had a certain success in legal literature[2] and it was approved of in the highly suggestive explanations accompanying the Draft Act, 1930, in the course of which the Reich Minister of Justice thus described the structural changes of German Company Law :

> In the first place there is the replacement of merely individualistic views by the legal idea that the enterprise is not only the outer frame for pursuing the interests of individual citizens but also, as such, a legal good of a special character and an institution for special purposes, an institution which the State must protect and promote even in so far as the necessity for protection and promotion is inconsistent with the individual interests of the shareholders. Apart therefrom the transformation of the power of control within the company assumes distinct shape. It is partly a consequence of modern tendencies of concentration, partly due to the desire for giving greater mobility to the active forces within the Board. The object of making the development of enterprises independent of varying majorities of shareholders could only be reached by a restriction of the rights of the general meeting and the individual shareholders. . . . On the strength of these ideas the Draft Act recognizes the principle, approved of by the Courts,[3] that the interests of " the enterprise as such " are as worthy of protection as the individual interests of the individual shareholder.

Yet the theory which thus somewhat prematurely received official sanction has nevertheless in fact met with serious criticism in various quarters. It was rejected in Staub-Pinner's leading Commentaries[4] and its substance has been described by Professor Nussbaum as a " confusing blunder " and as the ideology of a ruling system.[5] A similar judgment has been passed by economists, especially by Passow[6] and M. J. Bonn,[7] whose observations are particularly interesting. But the most outspoken comment has been made by Professor Reichel, whose remarks on Fascist tendencies in Company Law in general equally apply to the theory of the " enterprise as such." [8]

> It is surprising to see how in an age of democracy and sovereignty of the people an oligarchization of company matters is aimed at which degrades

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[1] Netter, *loc. cit.*, p. 597.

[2] The material is collected in, Netter, *loc. cit.* An excellent comparative survey of the modern ideology in the sphere of Company Law is given by Robert Goldschmidt, *Recenti tendenze nel diritto della società anonima*, Firenze, 1935.

[3] At that time this was probably an exaggeration.

[4] S. 178, note 23.

[5] *Beiträge zum Wirtschaftsrecht*, ii, 499 *sqq.*

[6] Betrieb, *Unternehmung, Konzern* (1925) ; *Der Strukturwandel der Aktiengesellschaft* (1930).

[7] *Schicksal des deutschen Kapitalismus* (1930) ; *Kapitalismus und Feudalismus* (1932).

[8] *Juristische Wochenschrift*, 1930, 1459.

the shareholders to a mere *misera contribuens plebs.* Even the outworn stock-phrase of the "organism" of the company had to be used to glorify a Fascist tyranny of the Board, not to speak of minorities for the benefit of which otherwise—in Geneva and elsewhere—such well-meant speeches are nowadays made. These bureaucratic tendencies cannot be sufficiently strongly resisted. They originate from a totally wrong principle. As the State, so the Company does not serve its own purposes, but its members, and the gentlemen of the Board are not masters, but servants.—*L'Etat, ce sont nous.*

Influence of Antecedent Tendencies on the New Act.—In these circumstances it was clearly necessary to explain the ideological forces operative in Germany before the new Act of 1937. Neither the Official Reasons, prefixed to the Act, nor the preliminary reports refer to the antecedent tendencies. But their present or, at least, potential importance lies in the fact that, as regards the basic ideas of the new Act, the theory of the "enterprise as such" is capable of supplying and has in fact prepared the material on which the construction of the new Act and the future course to be adopted by the courts in elucidating its principles may eventually be built; it was indeed with well-earned justification that, soon after the publication of the first report of the Committee of the Academy for German Law, the protagonist of that theory claimed that the proposals and ideas of the report were by no means revolutionary and that, on the whole, they did not differ very much from what had been taught and practised before.[1]

This will become still more evident by a scrutiny of the changes in outlook brought about by the Act of 1937. It may be said at the outset that though they are considerable if a comparison is made between the new Act and the provisions of the Commercial Code of 1897 as amended by the decrees of 1931, they lose much of their practical and ideological significance and novelty if we do not start from these enactments, but from the "living law," *i.e.* the practice as developed before 1933, and from the postulates of the theory of the "enterprise as such." Looking at the Act from this point of view, it will appear that the fundamental changes which it effects or is supposed to effect in three directions are by no means so great as to justify its authors' and promoters' boasts; "but to say so may be good *usus modernus.*"[2]

Abolition of Limited Liability.—The influence of the pre-revolution ideas is less evident when we consider the first group of new provisions, falling under the heading of "abolition of limited liability." They still show here and there the influence of the desire held in some quarters to abolish the company limited by shares altogether. "According to National Socialist views the limited company is to be admitted only where an enterprise is to be created on a broad financial basis and, for this purpose, to attract broad sections of the people to collect the required means. Otherwise business men should bear unlimited personal responsibility."[1] The Act therefore provides that the minimum capital of a limited company is 500,000 RM (£25,000 at par), and that the minimum nominal value of a share is 1,000 RM (£50 at par).[2] The effect of this change is somewhat impaired by the fact that in both directions the Reich Ministry for Justice in conjunction with the Reich Ministry for Economics may admit exceptions[1] and that the "*Gesellschaft mit beschränkter Haftung*," which in its functions roughly corresponds to the English private limited company and which is regulated by an Act of May 5, 1898, is not affected by the new Act.

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[1] Netter, *Der Bericht des Aktienrechtsausschusses der Akademie für deutsches Recht, Hanseatische Rechts- und Gerichtszeitschrift*, xvii (1934), 338 *sqq.*

[2] Language of F. Morstein Marx, 50 (1937), Harvard L.R. 854.

Another change consists in the requirement that the names of all administrators and of the president of the council of supervision[3] should appear on all business communications, and the names of all administrators and all members of the council of supervision in the yearly accounts.[4] While the former provision, familiar to English lawyers, is new, the latter puts the prevailing practice on a statutory basis.[5]

Dissolution of Company Endangering the Common Weal.—The second alleged fundamental change, in regard to the influence of the State, is not very conspicuous. The Act makes clear that a company which imperils the common weal, *e.g.* "by a behaviour of the Board which grossly violates the law or the principles of responsible business methods," can be dissolved by the Reichswirtschaftsgericht on application by the Reich Ministry for Justice.[6] The possibility of dissolving a company endangering the common weal, however, always existed.[7] Moreover, the interest of "people and Reich" has become a factor on which, in certain connexions, emphasis is placed by the Act.

On the other hand an important tendency must be noted to which attention will have again to be drawn. In several connexions far-reaching changes apparently effected by the Act (increase of the minimum capital and of the nominal share value, prohibition of shares giving more than one vote, prohibition of the purchase of the company's own stock, number of members of the council of supervision[8]) lose much of their weight by the significant fact that the one or the other Reich Ministry may admit exceptions. "While the chamber is abolished, the ante-chamber flourishes."[9]

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[1] *Official Reasons*, Introduction.

[2] Ss. 7, 8.

[3] The new Act retains the German separation between administrators or managers or directors and council of supervision.

[4] Ss. 100, 128 (iv), 144 (1).

[5] The voting rights of banks which might have been mentioned in this connexion, are dealt with below.

[6] S. 288.

[7] S. 43, Civil Code, which according to the prevailing opinion was applicable to limited companies, and under Prussian law; see Staub-Pinner, s. 292, note 16.

[8] Ss. 7 (2), 8 (2), 12 (2), 65 (1), 86 (1).

[9] Language of an American author quoted by Loewenstein, 45 (1936), Yale L.J., 779, 787. On the other hand, it is worthy of notice that a share of profits, contractually conceded to the members of the Board, must be in a reasonable relation to the outlays for the benefit of the staff or of institutions serving the common weal; this obligation can be enforced by the Public Prosecutor bringing an action: ss. 77 (3), 98 (4).

But this subject cannot be left without reminding the reader that under a Dictatorship private law in general is so much open to State influences and has so much the character of mere administrative rules, that legislation as such is unable to convey the whole of the picture. The first report of the Committee appointed by the Academy for German Law emphasizes[1] "how deeply the principle of the Totality of the State already begins to encroach upon economics and company matters," and "that this cannot be comprised into paragraphs"; "the pervasion of enterprises, especially of limited companies, with National Socialist spirit, their spiritual transposition is a matter of people's education, of skilful economic administration and, after all, of time."

Principle of Leadership.—This leaves us with the last fundamental innovation, viz. the realization of the "Principle of Leadership" in company law. What this political principle could have led to in the sphere of company law it is impossible to imagine, but it may be safely assumed that it might have resulted in so radical a transformation of the structure of a company that not much of what is usually understood thereby would have been preserved. The new Act, however, confines itself to a more moderate line which is generally described by the Official Reasons as intending to prevent "that the Board in the course of its administration depends to the extent hitherto known on the mass of irresponsible shareholders who mostly lack the necessary insight into the position of the business." It will appear that this limited application of the leadership principle has been rather radically carried through.

While formerly the General Meeting of shareholders was theoretically competent, though in practice by no means always called upon to decide all questions concerning the affairs of the company, the Act adopts a somewhat different course. It does not affect the rights of the general meeting to decide about alterations of the Articles and Memorandum of Association, especially in case of increase or reduction of capital, about the dissolution, merger and transformation of the company, the transfer of the assets and of profits, appointment and revocation of the members of the council of supervisors, their remuneration, discharge of the Board, claims against the Board and the promoters, appointment of auditors, division of profits.[2] But it deprives it of the privilege of disposing, whether by acceptance or rejection, of the yearly accounts, unless administrators and council of supervision submit the accounts to it or the council of supervision rejects the accounts proposed by the administrators[3]; in all other cases the accounts are established by the council of supervision accepting them as prepared by the administrators,[4] and they bind the general meeting for the purpose of a division of the profits.[5] This is undoubtedly the most important change effected by the Act, which indeed gives the Board the predominant position aimed at since the times of theory of the "enterprise as such."[1] The only safeguard against the use of the excessive powers thus given lies in a certain civil and criminal liability of the Board,[2] in the possibility of revoking the appointment of a council of supervision[3] which has thought fit to accept the Board's proposals without making use of the right to submit them to the general meeting, in the possibility of refusing to give a discharge[4] and to appoint special auditors[5] and in the hope that the regular auditors who are to be appointed by the general meeting[6] will refuse to pass improper accounts.[7] It remains to be seen whether the confidence thus placed in the Board will be justified; the history of company law in all countries, which has mostly led to stricter supervision, does not warrant optimism.

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[1] *Zeitschrift der Akademie für deutsches Recht*, I (1934), p. 34.

[2] See the enumeration in the Official Reasons, under the head of "general meeting."

[3] S. 125 (4).

[4] S. 125 (1) and (3).

[5] S. 126 (3.)

The second restriction placed upon the competence of the general meeting is that under the new Act it cannot decide questions relating to the management of the company's affairs, unless the administrators have required it.[8] Though this is a far-reaching encroachment, it cannot be overlooked that, apart from exceptional cases, it has never and nowhere been usual to call upon the general meeting to direct the management. In such exceptional cases, however, the Board will in future, too, obtain the shareholder's view, because by doing this it ensures that it cannot be made liable for damage.[9] Moreover, the Act maintains the duty of the council of supervision to call a general meeting whenever the interest of the company requires it,[10] and though such a meeting cannot give binding instructions to the administrators, it can express an opinion and even pass a resolution withdrawing its confidence in the administrators which enables the council of supervisors to dismiss the administrators without notice.[1]

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[1] It is significant that according to Netter (p. 355 *loc. cit.*) "this new provision does not involve an essential and substantial change," but "merely means the abolition of the difference between the real facts of the law and the formal provisions of the statute." *Sed quaere.*

[2] Ss. 84, 296.

[3] S. 87 (2); but a three-quarters majority is required.

[4] S. 104; a simple majority suffices.

[5] S. 118; generally a simple majority is required, but on the application of a minority of ten per cent. of the capital the court may appoint special auditors.

[6] S. 136.

[7] If a dispute arises between auditors and managers relating to the construction of provisions concerning the yearly accounts and the directors' report, the appointment of a special Board is envisaged by s. 135 (3).

It should be noted that the yearly accounts may be void, if they have not been audited, if they violate provisions aiming at the protection of the company's creditors or the public, and in certain other cases enumerated in s. 202.

[8] S. 103 (2).

[9] Ss. 84 (4), 99 as regards liability towards the company, but it is doubtful how far such a resolution affects liability towards the creditors; see s. 84 (5) and the comments in the Official Reasons.

[10] S. 95 (4); it is doubtful how this provision is to be reconciled with the other rule that the general meeting must be called by the administrators: ss. 105 (1), 195, No. 1.

While parliamentary rule within limited companies has thus been severely curtailed, the position of the Board has been materially strengthened. As regards the council of supervision, it may be of interest to note that, unless the Reich Ministry for Economics grants exception, the number of its members is limited to seven, if the capital does not exceed three millions of Reichsmark, to twelve, if it exceeds that sum, and to twenty, if it exceeds twenty millions Reichsmark.[2] As regards the administrators, the Act emphasizes the principle that they have to manage the company " under their own responsibility in the manner required by the interest of the enterprise and its staff and by the common good of people and Reich."[3] Apart from the fact that this provision does not even mention the interest of the shareholders, it merely expresses what has always been the law and the practice, viz. that it is the board of administrators who manage the company's affairs. The principle of leadership underlies the other innovations that, in case of disagreement between directors, the president authoritatively decides[4] and that, unless there is an important reason, the appointment of directors cannot be revoked during a period of five years.[5] The directors remain, however, subject to the control of the council of supervision[6] which is also entitled to receive reports[7]; the interesting sociological phenomenon of the supervised leaders may be noted in passing.

Examination of Individual Problems.—After this discussion of the general tendencies of German company law and of those provisions of the new Act which are, or are said to be, due to the recent changes in outlook, we now come to the examination of some of the numerous individual problems which, before 1933, were in the forefront of the aspirations for a reform and which had not already been definitely solved by the decrees of 1931. The following survey, it is hoped, will not only support what has been said above about the basic tendencies influencing the whole of the new Act and its application, but will also provide the English reader with an introduction to some of the burning questions of German company law.

Problem of Disclosure.—One of the most controversial questions concerned the extent to which shareholders are entitled to receive information on the affairs and position of the company.

As regards the yearly accounts the Act adopts and partly enlarges the provisions of the Decree of 1931 which prescribed extensive publication by giving detailed instructions as to the manner of making up the balance-sheet[1] and introducing obligatory auditing of the accounts.[2] The value of these provisions is, however, seriously impaired by the fact that as a rule the general meeting cannot interfere with the accounts fixed by the Board.

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[1] S. 75 (3), and see the observations in the Official Reasons.

[2] S. 86. [3] S. 70. [4] S. 70 (2).

[5] S. 75. But the general meeting may revoke the appointment of the council of supervision or refuse to discharge the directors, which is always an " important reason " entitling the council of supervision to dismiss them. It may be mentioned that the new Act contains provisions relating to the remuneration of the Board (ss. 77, 78, 98) and that it enlarges the liability of the members of the Board (ss. 84, 99).

[6] S. 95. [7] Ss. 95 (2), 81.

As regards the yearly report to be made by the Board[3] the Act also adopts most[4] of the former provisions which rendered it necessary to report and comment on matters of importance in general and on some specified events such as purchase of own stock, conditional and authorized increase of capital, remuneration of the Board, relations with concerns and trade associations aiming at regulating prices and production.[5] This report, it is true, is to be submitted to the general meeting for the purpose of taking it as a basis when deciding about the Board's discharge and the division of profits[6] and, otherwise than in the case of yearly accounts, the general meeting may thus accept or reject it ; it follows that a resolution based on a report violating the law or the Articles may be opposed by the institution of legal proceedings.[7] But these rights are curtailed by the fact that the Act substantially adopts the enactment of 1931 that, although on principle the report must be careful and true, information can be withheld in so far as the predominant interests of the company or an associated company or the common weal of people and Reich require it.[8] This far-reaching provision which enables the Board to conceal even the most important events provided that such concealment does not result in an untruth, but merely in an incompleteness,[9] may endanger the importance not only of the report, but of the whole system of disclosure. The protagonists of the theory of the enterprise as such who could regard that provision as the first statutory recognition of its postulates were not slow to assert that it was generally applicable,[10] that it ought to be extended to the reports to be rendered by the directors to the council of supervision[11] and that it was able to prevent criminal liability for false statements in the publications of the company.[12] The

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[1] Ss. 260*b*–261*e*, Commercial Code ; ss. 192 *et seq.*, Companies Act, s. 134 envisages that the Reich Minister for Justice will make regulations for the making up of consolidated balance-sheets in case of concerns.

[2] Ss. 262*a*–262*g*, Commercial Code ; ss. 135–142, Companies Act.

[3] Ss. 96, 127.

[4] Unfortunately the Act does not adopt the provision (s. 260*a*, No. 3) that shares the use of which is expressly or impliedly tied up for the benefit of the company or its subsidiary or associated companies must be disclosed.

[5] S. 260*a*, Commercial Code ; s. 128, Companies Act.

[6] S. 127 (2).

[7] S. 197.

[8] S. 260*a* (4), Commercial Code ; s. 128 (3), Companies Act.

[9] Staub-Pinner, s. 260*a*, note 6.

[10] Netter, *Festschrift für A. Pinner*, p. 608 ; *Zentralblatt für Handelsrecht*, 1932-136 ; *Friedländer*, s. 314, note 9 ; against this view Pinner, *Juristische Wochenschrift*, 1932, 2578, and Staub-Pinner, s. 246, note 7*a*.

[11] S. 81.

[12] Netter, *Juristische Wochenschrift*, 1932, 691. But this was not the prevalent opinion : see Staub-Pinner-Schmidt, s. 134, note 4, with further references.

Act of 1937 does not appear to accept this view.[1] It remains to be seen whether general tendencies will work in its favour.

As regards the question to what extent shareholders are entitled to receive an answer to specific questions put in general meetings, the Supreme Court had repeatedly taken the line[2] that although questions involving no harm to the interests of the company must in general be answered, the Board may refuse to do so, in which case resort may be had to a resolution of the meeting. If it votes in favour of an answer it must be given; if it votes against it, the matter is usually settled, but the shareholders may bring an action to show that the meeting's vote was an abuse of rights[3] or otherwise violated the statute or articles. The individual shareholder's right had thus become practically illusory.[4] The Act of 1937, however, makes clear that each individual shareholder is entitled to receive a truthful answer to his questions, provided that the supply of information would not injure the interest of the company or an associated company or the common weal of people and Reich; whether these conditions exist or not, is to be decided by the directors according to their judicially exercised discretion.[5] This proviso takes away what the first sentence has given[6]; the Official Reasons, however, believe that under a " purified economic attitude " disputes relating to the right of information will be less frequent.[7]

Pursuit of Objects Extraneous to the Company.—The Act contains some provisions relating to the pursuit of objects which are extraneous to the company.

New and interesting law is introduced by s. 101 which provides that whoever, for the purpose of obtaining special advantages foreign to the company, induces a member of the Board by using influence over the company to act to the detriment of the company or its shareholders is liable for resulting damage. This liability is not confined to shareholders. The reason given by the Official Reasons is that on the strength of business relations other persons than shareholders may have even greater influence on the company and its Board than shareholders, the underlying idea being that trustees of other people's capital are often particularly accessible to attempts to use influence. On the other hand, it is expressly provided that there is no liability if the influence is used in order to obtain an advantage " which serves interests worthy of protection " or if the shareholders by the mere use of their voting rights pursue special advantage extraneous to the company.

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[1] See s. 81.

[2] See the latest decision of February 12, 1937, *Frankfurter Zeitung* of April 3, 1937, No. 168.

[3] In the sense mentioned above.

[4] A vivid picture is drawn by Hachenburg (note 32 of the introduction to vol. iii (1) of Düringer-Hachenburg's *Commentaries*).

[5] S. 112.

[6] The present writer is, however, far from the view that shareholders' questions must under any circumstances be answered.

[7] As it now rests with the Board, not with the general meeting, to decide whether questions are to be answered, it is very doubtful whether the Official Reasons are right in saying that the shareholder may oppose the resolution by bringing an action.

Although the latter provision removes an uncertainty created by a recent decision of the Supreme Court,[1] the question to what extent the use of the shareholders' voting rights is unfettered remains a difficult one. The Act itself does not restrict the use of voting rights save by the provision[2] that shareholders who are members of the Board cannot vote if the resolution concerns their discharge or claims against them or the appointment of special auditors for the purpose of investigating their management, and by the adoption of the principle developed by the Supreme Court that resolutions based on a vote which wilfully aims at obtaining special advantages, extraneous to the company, to the latter's detriment, can be avoided by an action to be brought by an opposing shareholder or the Board.[3]

But otherwise the limitations imposed upon the exercise of voting rights are vague, because it is not clear whether and how far and towards whom (the company or the other shareholders) a general duty of loyalty exists. On the one hand, while the above-mentioned cases where the voting right is suspended have for the sake of certainty always been restrictively interpreted,[4] the Supreme Court recently decided[5] that if the shares belong to a partnership a member of which, being also a member of the Board of the company, is affected by the resolution, the right to vote is suspended, the reason being that economically the shares belonged to the partner and that the respective provision of the Commercial Code was

> already based on the collective idea now pervading the present organization of the State: the duty of loyalty towards a community, imposed upon its members, was intended to be emphasized, and it was to be made certain that the organs of a company take their measures in the exclusive interest and for the benefit of the community, and that they do not allow themselves to be prevented therefrom by selfish interests.

On the other hand, the above-mentioned principle that a shareholder cannot exercise his rights to vote in pursuance of selfish interests tended to change its character. While it is believed that this principle was originally designed to protect the minority, the theory of " the enterprise as such " taught[6] that " no shareholder can use his influence save in the interest of the enterprise," and at the end of 1933 the Supreme Court seemed to adopt this view when it had to decide the question whether, as regards a co-contracting party to whom he had promised to abstain from direct or indirect competition, a majority shareholder is bound and entitled to impose the effects of such a covenant upon the company. It was held that there was no such duty towards the co-contracting party, as there was no such right towards the company, because a shareholder cannot use, " or rather abuse," his voting rights in opposition to the interests of the company for the purpose of fulfilling his own obligations.[1] As far as the new Act itself is concerned, it would not appear to accept this view.[2]

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[1] RGZ 142, 219, 222 (November 14, 1933); previous decisions on which this judgment is alleged to be based did not envisage a liability towards the company, but towards the minority shareholders.

[2] Ss. 114 (5), 118 (10).

[3] S. 197: but even special advantages extraneous to the company may now be pursued if this serves " interests worthy of protection."

[4] See *e.g.* RGZ 81, 37; 119, 387; 133, 90; Flechtheim, *Juristische Wochenschrift*, 1925, 1595; Staub-Pinner, s. 252, note 23.

[5] RGZ 146, 71 (December 4, 1934); *cf.* RGZ 146, 385 (January 22, 1935).

[6] Netter, *Festschrift für Pinner*, p. 594, with further references.

We now come to a number of questions relating to the method by which Boards have been able to fortify their own position.

Shares with a Plurality of Votes.—While shares carrying more than one vote were always allowed and often used in connexion with the reconstruction of financially weak companies, they changed their function since 1919 when the plurality of votes became the chief thing and when they became means in the fight for control, mere " ruling shares " (*Herrschaftsaktien*).[3] This was usually justified by the alleged necessity of giving protection against the predominant influence of " strangers " : it was said that it was necessary to prevent the undesirable influence of foreign shareholders and of competitors. Such shares were created by a resolution authorizing the increase of capital by the issue of shares with a plurality of votes, which, to the exclusion of existing shareholders, were issued to members of the Board, banks or subsidiary companies. The frequency of these shares, the danger of which lies in the fact that they enable a company to be ruled not by a capital but by mere voting power, has of late diminished, and, moreover, their creation became more difficult when the Supreme Court made it clear that, not for the exclusion of the existing shareholders' right to participate in the increase, but for the increase of the capital itself a majority of three-quarters of the capital (not of the votes) represented at the general meeting was required.[4] The principles of this decision have been taken up by the Act of 1937 which increased the number of provisions requiring a majority of three-quarters of the capital represented at the general meeting[5] and which included in it the case of a resolution depriving shareholders of their right to participate in an increase of the capital.[6] The value of this provision, in itself undoubtedly moderate, is enhanced by the fact that, though the Act of 1937 renders the issue of shares with a plurality of votes invalid it enables the Reich Ministry for Economics in conjunction with other Ministries to admit exceptions " if the welfare of the company or of the community require it,"[7] and the Official Reasons, speaking of the "situation created by the maintenance of shares with a plurality of votes,"[1] rather suggest that a liberal use will be made of that power.

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[1] RGZ 142, 219 (November 14, 1933) : see also Supreme Finance Court, April 9, 1937, *Reichssteuerblatt*, 1937, 604.

[2] Ss. 101 (3), (7) ; 197 (2).

[3] Report of the Enquete Committee on p. 7, Hachenburg Note 13 ; Nussbaum, *Zentralblatt für Handelsrecht*, 1932, 125.

[4] RGZ 125, 356.

[5] See the comments on the Official Reasons.

[6] Ss. 153, 154.

[7] S. 12 (2).

Shares Issued to Friends of the Board to the Exclusion of Shareholders.—A still more dangerous weapon in the hands of the Board are the so-called "*Schutzaktien.*" These were ordinary shares issued to friends of the Board to the exclusion of the existing shareholders. The issue of such shares was often legitimate, because they replaced the institution of the authorized capital hitherto unknown in Germany. But they could easily become, and indeed became, a method of gaining control inasmuch as the holders were instruments in the hands of the Board. As they do not form a separate class, as they restricted dividend rights of other shareholders and minority rights, dependent on the possession of a certain part of the capital, still more than shares with plurality of votes, and as they were generally paid up to the extent of one-quarter of their nominal value only, thus practically giving holders four votes instead of one, they were particularly dangerous and the Supreme Court emphasized that it was necessary to examine with particular care whether their creation was not an abuse of majority rights and whether the legitimate purposes aimed at thereby could not be reached "in a very much more sparing manner."[2] The new Act adopting ideas of the Draft Acts has taken some successful steps to make the creation of such shares unattractive. In the first place the Act introduced the possibility of an increase of the capital by creating an authorized capital.[3] Moreover, the holder of "*Vorratsaktien*" must pay for them in full and cannot rely on an agreement to take the shares for another person's, *i.e.* the company's account[4]; until the shares are taken over for the holder's own account, they carry no rights whatsoever,[5] and even when the shares have thus been taken over, they give no voting rights until they have been paid up in full.[6]

Deposit Shares.—A further important question concerns the so-called "deposit shares." Most German shares are bearer shares held in custody by the banks who, in their standard contracts, usually obtain the right to exercise in their own name the voting power attached thereto. Though this is legal,[7] it facilitates the evasion of provisions aiming at a restriction or suspension of the voting rights of the owner, and it gives the banks a predominant influence; on the other hand, it secures the representation of a great number of shares which otherwise would not be represented and which in this country are represented by proxy. In substantial accordance with the practice voluntarily adopted by the banks[1] the Act prescribes[2] that banks must have an authorization in writing which cannot be given for a longer period than 15 months and which is freely revocable ; it also provides[3] that the register of members present at the general meeting must contain separate statements as to the amount and class of shares the voting rights of which are used by a person other than the owner. Although banks " generally vote in favour of the Board,"[4] and although deposit shares thus easily become instruments in the hands of the Boards, it would indeed have been inadvisable to abolish their use altogether, the more so as shareholders are at liberty to revoke their authority if they so desire.

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[1] See under the head of "Right to vote."

[2] RGZ 132, 159.

[3] Ss. 169 *sqq.* But contrary to English law the original capital must be fully paid and cannot be authorized.

[4] S. 51. This was so already under the old law: Supreme Court, *Juristische Wochenschrift*, 1931, 2954; Flechtheim in *Düringer-Hachenburg*, s. 226, note 59. But it was often taken for granted that the share would be paid by the company (see Hachenburg, introduction to vol. iii (1) of *Düringer-Hachenburg*, notes 14, 65), and it is remarkable that s. 6 of the Introductory Law accompanying the new Act enables shareholders to get rid of their liability thus undertaken.

[5] S. 51.

[6] S. 114 (2).

[7] RGZ 118, 330: Flechtheim in *Düringer-Hachenburg*, note before s. 222.

Purchase of Company's Own Stock.—The last important problem which requires discussion concerns the purchase of the company's own stock.

While the cases dealt with above suggested a strengthening of the Board's powers at the expense of shareholders, the purchase of the company's own stock injures the creditors of the company. If German law did not know of any special provisions, such transactions would be as illegal[5] as they are in this country[6] and at least in principle in other countries too.[7] But the Commercial Code to a certain extent permitted the purchase and it was not before the crisis of 1931 that the very serious character of these manipulations was appreciated. It then appeared that numerous companies had purchased their own stock to an unheard-of extent[8] and these shares had frequently been taken over from "friends of the company" outside the Stock Exchange at high prices ; the only justification which was offered in support of this objectionable practice was the " interest of the company " which, it was alleged, required support to be given to the share market. The amending decree of September 1931 considerably remedied the position. But though the purchase was on principle prohibited, important exceptions and loop-holes were admitted of which many Boards readily availed themselves.[9] In May

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[1] See *Bankarchiv* xxx, 116.

[2] See 114 (4).

[3] Ss. 110, 300.

[4] Report of the Enquete Committee, p. 27.

[5] This opinion is, however, not generally accepted. See on the question RGZ 146, 84 (October 19, 1934), and Flechtheim in *Düringer-Hachenburg*, s. 226, note 14, with further reference. See now ss. 52, 56.

[6] *Trevor* v. *Whitworth*, 12 A.C. 409.

[7] See the illuminating article by Nussbaum, 35 (1935), Columbia L.R., 971 ; as to France, see Mann, *Zeitschrift für ausländisches und internationales Privatrecht*, 7 (1933), 450.

[8] Thus the five most important banks had purchased from 33 to 65 per cent. of their own stock. See Nussbaum, *Juristische Wochenschrift*, 1932, 2585, note 16, and 35 (1935) *Columbia L.R.* 973.

[9] Thus the balance-sheet of the Bayrische Hypotheken & Wechselbank for 1933 discloses that this company, which in 1931 had 9 millions of its own stock, had 11 millions out of a capital of 45 millions Reichsmark (*Frankfurter Zeitung*, March 6, 1934, No. 118, p. 3).

1936, a law was passed authorizing the Reich Ministry for Justice to dispense companies from the observance of the provisions prohibiting the purchase of their own stock,[1] but it appears that even after that Act, purchases were made without permission.[2] The Act of 1937[3] appears to aim at a distinct improvement of the position, though unfortunately it has not gone far enough and has again adopted a complicated scheme the rough outlines of which are as follows: Apart from the acquisition by way of a gift or in the course of a buying agency or in the course of a reduction of capital, a company is not allowed to purchase its own stock, unless "it is necessary for averting serious damage from the company," in which case up to 10 per cent. of the whole of the capital may be purchased; the maximum amount of 10 per cent. for the calculation of which shares previously purchased by and still in the possession of the company must be taken into account[4] can, however, be increased by permission of the Reich Ministry for Justice. A subsidiary company cannot purchase the dominant company's shares save under the same conditions, and the same applies to the purchase by another person for account either of the dominant or the subsidiary company. Violation of these provisions does not affect the validity of the sale, but invalidates the agreement to sell[5] and renders the shareholder liable to pay an amount corresponding to the nominal value of the share[6] and renders the Board liable to indemnify the company and its creditors in respect of any damage. Shares purchased by the company or by a third person for its account do not carry rights,[7] but shares purchased by or for a subsidiary company are excluded from the right to vote only.[8] Acceptance by way of security is throughout on the same level with purchase. Transactions involving the purchase of the company's own stock in the above-mentioned sense must be disclosed in the statutory report[9] and such shares are to be indicated as assets in the balance-sheet.[10]

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[1] *Reichsgesetzblatt*, 1936, 439.

[2] Thus the Landré-Breithaupt-Weissbier Brauerei A.G. purchased 105,300 Reichsmark of its own stock out of a capital of 300,000 Reichsmark, the reason apparently being "that a block of shares came on the market and that the Board was afraid it could be sold to undesirable people, perhaps to a competitor" (*Frankfurter Zeitung*, April 3, 1937, No. 168, p. 4).

[3] S. 65.

[4] This had hitherto been doubtful; see Flechtheim in *Düringer-Hachenburg*, s. 226, note 19.

[5] This had also been doubtful; see Flechtheim, *loc. cit.*, note 25.

[6] Ss. 52, 56.

[7] *I.e.* no rights to vote, to receive dividends or to participate in an increase of capital. It should now be clear that such shares cannot be taken into account for the purpose of arriving at a quorum. This has also been doubtful; see Flechtheim, *loc. cit.*, note 32, and Staub-Pinner, s. 251, note 4*a*.

[8] S. 114 (6). This was different under the old law: RGZ 149, 305 (November 19, 1935).

[9] S. 128.

[10] S. 131.

THE FRENCH LAW OF DOMICIL IN RELATION TO FOREIGNERS.

[*Contributed by* M. F. P. Herchenroder, Esq., *Docteur en Droit* (*Paris*).]

Governmental Authorization.—The authors of the Code Napoléon declared the domicil of a Frenchman for civil purposes to be at the place of his principal establishment.[1] With regard to foreign residents, the topic of their domicil was only indirectly touched upon in Art. 13, under which foreigners authorized by Government to fix their domicil in France were to enjoy full civil rights in that country. For a century and a quarter these two provisions, read together, were construed by French judges to preclude foreigners who had not obtained the governmental authorization—who, as the phrase was, had not been "*admis à domicile*"—from acquiring a French domicil proper, although all the ingredients of a domicil *de facto* might exist. On the other hand, "*admission à domicile,*" which conferred on the foreigner a middle state between that of alienage and that of citizenship, a kind of denizenship, so to speak, came in process of time to be regarded as the preliminary step to naturalization. It amounted to naturalization on a small scale (*une petite naturalisation*), and when the articles of the Code relating to nationality were amended by the law of June 26, 1889, the opportunity was seized in order to add a paragraph to Art. 13, in virtue of which the effect of governmental authorization ceased at the end of five years if the foreigner had not applied for naturalization or if his application was refused.

Somewhat analogous was the doctrine at one time laid down in the so-called "allegiance cases" in England, according to which a change of domicil involved something like a change of allegiance, so that, for instance, an Englishman, in order to acquire a French domicil, had, so far as in him lay, to endeavour to become a French citizen.[2]

Recognition of Domicil *de facto* for Certain Purposes.—The view taken by the courts was widely criticized by eminent writers, but in practice it was the case-law that mattered. Still, less inconvenience than might have been expected was in fact experienced from this narrow judicial interpretation of the Code. For one thing, the judges themselves were compelled by the force of circumstances to depart from too rigid an adherence to it and had to recognize for certain purposes the foreigner's domicil *de facto*. Thus, where two British subjects of Maltese origin had married on French territory without having previously regulated by contract their rights and interests in each other's property, the Algiers Court of Appeal took into consideration their French *de facto* domicil in coming to the conclusion that they had subjected themselves to the legal community of property, the common law of France in the absence of a special contract.[1] In like manner the courts, in determining whether they had jurisdiction in virtue of Art. 110 of the Civil Code under which the place where a succession opens depends on the deceased's domicil, held that a French domicil *de facto* was sufficient to give them jurisdiction. In 1832 Duke Charles II of Brunswick, having had to leave Germany, settled in Paris, where he bought a house and lived for the most part until he was expelled on the outbreak of the Franco-German war in 1870. He thereupon retired to Geneva, where he died in 1873 after bequeathing his property to that city. An action impugning the will having been started in the French court, the defendant objected to the forum chosen, but the court was of opinion that the Duke had acquired a true domicil in France, although he had not been authorized to fix his domicil there, that he had retained this domicil, and that the French court was rightly seised of the case.[2] Similarly, the domicil *de facto* was recognized for the service of process and the institution of legal proceedings against the resident foreigner.

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[1] Art. 102. It should be observed that in French law there may be a special domicil for certain purposes, distinct from the civil domicil of Art. 102. *Cf.* Dalloz, *Répertoire Pratique*, iv, p. 484, sub. verb. "*Domicile.*" It should also be noted that the word "*domicile*" is frequently used in France with reference to a particular part of France herself, *e.g.* a man may be domiciled in Paris or Dijon or Marseilles, etc., whereas in English law the notion of domicil is with regard to a country as a whole, *e.g.* a man is said to be domiciled in England, Scotland or France, etc.

[2] *Cf.* Dicey's *Conflict of Laws*, 4th ed., App., Note 6, p. 841.

Distinction between Authorized Domicil and Domicil *de facto*.— Apart from this, an important practical consequence of the distinction between foreigners having an authorized French domicil and those domiciled only *de facto* disappeared with the abolition of imprisonment for debt by the law of July 22, 1867. Prior to this, foreigners "*non admis à domicile*" had been liable, under laws of September 10, 1807 and April 17, 1832, to arrest and imprisonment at the suit of any Frenchman who had obtained judgment against them for a principal sum of 150 francs or more, and, what was more serious, they had been exposed to arrest by order of the court even before judgment—a provision which appears to have been grossly misused.[3]

In two departments, however, the view taken by the courts retained considerable practical importance.

1. While it is an accepted principle of French law that the succession

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[1] May 2, 1898, Dalloz, *Périodique*, 1898.2.457. *Cf* Aix, November 27, 1854, Dalloz, *Périodique*, 1857.2.43.

[2] Dalloz, *Périodique*, 1894.2.513 and 1895.1.344.

[3] *Cf.* "*Exposé des Motifs*," Dalloz, *Périodique*, 1867.4.74, note at p. 80. French judgment-debtors and foreigners "*admis à domicile*" were also liable to imprisonment for debt, but in a more restricted manner.

to the moveables of a foreigner dying in France is governed by the law of the deceased's domicil—*mobilia sequuntur personam*—domicil in this connexion was construed to mean the domicil acquired by governmental authorization under Art. 13. Accordingly, if the deceased had been "*admis à domicile*," the succession to his moveables was governed by French law. If, on the other hand, he possessed only *de facto* a French domicil, the courts applied the law of the domicil of origin, which very often coincided with the national law of the deceased. The national law might, of course, rule that the law of the deceased's true domicil (the *de facto* domicil) should govern the succession, and in that case French law became applicable by the devious path of the *renvoi*.[1] But the situation was not free from paradoxes. Thus, in *Annesley's case*,[2] the High Court in England held that the deceased, an Englishwoman, had acquired a domicil in France by long-continued residence coupled with the intention of indefinite residence. Her will, however, declared that she had never intended to abandon her English domicil and had not applied under Art. 13 of the French Civil Code for authority to fix her domicil in France or for naturalization. Had the case been before the French courts, they would no doubt have held that the deceased had no domicil in France, and it is only by the application of the doctrine of the *renvoi* that French law would have become applicable. But case-law in France has not the same authority as in England, and there are French judges who do not accept that doctrine. They might thus have refused to apply French law to a succession which by English law itself should have been governed by French law.

It should be observed, however, that no difficulty could arise where the deceased foreigner was Stateless (*heimatlos*[3]) or where he possessed a dual nationality: the French courts in such cases applied the law of the domicil straight away.

2. Under Art. 16 of the Civil Code and Art. 166 of the Civil Procedure Code, foreigners who are the principal plaintiffs or interveners in legal proceedings must, if the defendant is French and demands it, furnish security for costs unless they own immoveables in France of a sufficient value to secure the payment thereof.[4] The foreigner "*admis à domicile*" could demand such security from a foreign plaintiff, while it could not be demanded from him by a French defendant. The foreigner with only a *de facto* domicil enjoyed no such privilege.[5]

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[1] *Vid.* Mr. Politis' note, Dalloz, *Périodique*, 1905.2.73 at p. 75, and Mr. Lepaulle's article in Clunet, *Journal du Droit International*, 1933, at p. 812.

[2] [1926] 1 Ch. 692; 42 T.L.R. 584.

[3] The term "*apatride*" is now frequently used instead of "*heimatlos*," which apparently originated in Switzerland.

[4] In the absence of a treaty to the contrary.

[5] It should be added that under Art. 109 of the Civil Code, domestic servants who are of age and live with their master have no other domicil than his by rule of law. Where the master was a foreigner, the rule was deemed not to apply, although the foreigner might in fact be domiciled in France, unless of course he had been "*admis à domicile*."

Recognition of Domicil ***de facto*****.**—After the war the whole topic of French nationality was overhauled and regulated in a law of August 10, 1927. That law repealed Art. 13 of the Civil Code, and thus removed the main obstacle to the recognition of a domicil *de facto* in the case of foreigners.[1] In an action before the Seine Civil Court in 1933 the judges pointed out that such a domicil must to-day be held to be the foreigner's domicil in law, since to hold otherwise would be to deny to foreigners the possibility of ever acquiring a domicil in France, the acquisition of a French domicil by governmental authority having been abolished by the 1927 law.[2]

Distinction between Civil and Fiscal Notions of Domicil.—If prior to the repeal of Art. 13 the tendency of the French judiciary had been to scout the notion of a French domicil in relation to foreigners "*non admis à domicile*," the matter had been viewed in a different light by the fiscal authorities. Many wealthy foreigners make their home in France while retaining their nationality, and the courts' ruling, when applied to them in connexion with income-tax and death duties, meant heavy loss to the French Exchequer. The Revenue authorities were thus impelled to take a more realistic view of foreigners' domicil and to consider it as being primarily a question of fact, and when in 1869 the Cour de Cassation—the French Court of Final Appeal—laid down the proposition[3] that death duties were not assessable on the foreign securities held by foreigners possessed only *de facto* of a French domicil, the Legislature intervened. Under Art. 4 of the law of August 23, 1871,[4] foreign transferable securities held by foreigners domiciled in France were made liable to death duties, whether or not the foreigner had had authority to fix his domicil there. This marked the cleavage between the "civil" and the "fiscal" notions of domicil, and subsequent fiscal enactments maintained it.[5]

As a result, the *indicia* from which domicil can be inferred have already been the subject-matter of authoritative consideration. Thus, the renting of a flat in France for a great number of years together with the deposit in a French bank of important securities has been declared to produce a French domicil. Similarly, residence in France during the winter months over a large number of years coupled with the payment of the inhabited-house tax (*contribution mobilière*),[6] the deposit of securities in that country and a declaration of residence to the local authorities has been deemed to constitute a domicil. The purchase in

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[1] *Cf.* the article by the late Professor Audinet in *Revue de Droit International Privé*, vol. xxiii, 1928, p. 1, and that of Mr. Valéry in Clunet, *Journal du Droit International*, 1928, p. 592.

[2] May 11, 1933. Clunet, 1933, p. 970.

[3] January 12, 1869. Dalloz, *Périodique*, 1869.1.294.

[4] Now Art. 51 of the Code de l'Enregistrement, decree of December 21, 1934.

[5] *Cf.* Art. 37 of the law of March 29, 1914; Art. 11 of the law of July 15, 1914; Art. 30 of the law of March 22, 1924; Art. 26 of the law of April 4, 1926.

[6] This tax is assessable on any person having at his disposal a furnished dwelling-house. Houses for commercial or industrial purposes do not attract the tax.

France of houses or other landed property has often been a circumstance on which weight has been laid as indicative of domicil.[1] If, however, the resident foreigner possesses more valuable landed property or securities abroad or is more heavily assessed to income-tax there, the inference to be drawn from his activities in France may be rebutted, as the principal establishment is the element which underlies the French notion of domicil.

In 1899 a Frenchman who had become a naturalized Swiss citizen died in Paris. He was the manager of an important French concern and had rented for his personal use a flat in the Champs-Elysées which he had lavishly furnished, the furniture there being insured for a sum of 1,700,000 francs. The lease was for a term of twelve years. The deceased had another house in Switzerland, but its furniture was insured for only 127,477 francs. In reporting his death to the municipal authorities, his brother-in-law and his nephew declared that he was domiciled in Paris. On those facts, the Cour de Cassation held that the deceased was domiciled in France within the meaning of Art. 4 of the law of August 23, 1871.[2]

With the repeal of Art. 13 of the French Civil Code, the distinction between the "civil" and "fiscal" notions of domicil in relation to foreign residents may be said to have disappeared from French law. The domicil of foreigners residing in France will, for all purposes, be determined as a question of fact.[3] It should be observed, however, that the English view of what constitutes domicil differs from the corresponding French notion, as French courts have never insisted, for one thing, on the *intuitus manendi* to the same extent as the English courts. In one case, the Paris Court of Appeal went so far as to lay down the proposition that residence is only a secondary element in the French conception of domicil, which "essentially rests upon the determination of a person's principal establishment and the centre of his interests."[4] The deceased in that case had important interests in Argentina though he had spent most of his life in France; he had, moreover, expressed the wish to be buried in Argentina. On those facts the court held that the deceased did not possess a French domicil.[5] Another consequence of the repeal of Art. 13 will be that Arts. 103–5 of the Civil Code, which were primarily applicable to French citizens, will now be also applicable to foreigners. These articles provide that change of domicil is effected by actual residence in another place coupled with the intention of the resident to make it the place of his principal establishment, this intention being evidenced by an express declaration to the municipal authorities or gathered from all the circumstances of the case.

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[1] *Cf.* the article signed L. S. in Dalloz, *Hebdomadaire*, 1934, *Notes fiscales*, p. 17.

[2] December 30, 1929, Dalloz, *Hebdomadaire*, 1930, p. 65.

[3] Subject, naturally, to cases of creation of domicil by operation of law, *e.g.* in the case of married women, minors, etc. *Vid.* Arts. 107–9 of the Civil Code.

[4] October 28, 1935, Dalloz, *Hebdomadaire*, 1936, p. 25.

[5] For a criticism of this decision, see Clunet, 1937, p. 96 (note).

Some years ago the *Société d'Etudes Législatives* had suggested that a foreigner should be deemed to have acquired a domicil in France by habitual residence in that country for three or five years, or, even without any length of residence, by the absence of any other domicil,[1] but the suggestion has not materialized in legislation. This is not to be regretted, perhaps, as such a hard-and-fast rule, while making for certainty, would have robbed the topic of much of the interest it undoubtedly possesses.[2]

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[1] *Bulletin de la Société d'Etudes Législatives*, 1930, p. 175.

[2] In the decree of July 20, 1934, codifying the law relating to income-tax, a distinction is made between habitual residence and domicil proper. Habitual residence, as there defined, is constituted by the having at one's disposal a dwelling-house in France, whether as owner, usufructuary or tenant, provided in the last case that the tenancy is for a continuous period of at least one year, or, in the absence of a dwelling-house, by the fixing of one's main abode in France. Habitual residents who are not domiciled in France are assessed to income-tax on a sum equal to five times the rental value of the dwelling-house or houses at their disposal there. On the other hand, persons domiciled in France are assessed on their actual income. This applied to Frenchmen and foreigners alike. But the law has now been modified in favour of resident foreigners. Under Art. 35 of the Fiscal Reform law of December 31, 1936, foreign residents, even if they are domiciled in France, will be assessed, not on their actual income, but on the *forfait* basis, *i.e.* on a sum equal to five times the rental value of the dwelling-houses at their disposal in France, unless the income derived by them from property possessed by them in France or their activities in that country exceeds that sum.

It may not be out of place to mention here that French fiscal law is somewhat complicated by the fact that of the two Inland Revenue Departments, the *Contributions Directes* and the *Enregistrement*, the former is subject to the so-called administrative courts, the final appeal being to the *Conseil d'Etat*, while the latter is amenable to the ordinary civil courts, which are subordinate to the *Cour de Cassation*. The views of the *Conseil d'Etat* and the *Cour de Cassation* do not always agree.

NATIONALITY, THE FLAG AND REGISTRATION AS CRITERIA FOR DEMARCATING THE SCOPE OF MARITIME CONVENTIONS.

[*Contributed by* C. Wilfred Jenks, Esq.]

In the course of the Twenty-first Session of the International Labour Conference an interesting discussion arose as to whether nationality, the flag or registration is the most appropriate criterion for the demarcation of the scope as regards vessels of international Conventions defining standards to be enforced on board in the public interest. The discussion led to the appointment of a Co-ordination Committee which recommended registration as the most appropriate criterion, and effect was given to this recommendation in the five important Conventions adopted at the Twenty-first Session of the Conference, the Officers' Competency Certificates Convention, 1936, the Holidays with Pay (Sea) Convention, 1936, the Shipowner's Liability (Sick and Injured Seamen) Convention, 1936, the Sickness Insurance (Sea) Convention, 1936, and the Hours of Work and Manning (Sea) Convention, 1936. Some account of the grounds upon which the Co-ordination Committee recommended registration as the most appropriate criterion may be of interest to those concerned with other groups of maritime Conventions.

Criteria adopted in Earlier International Conventions.—The Co-ordination Committee had before it a document which reviewed the criteria for the demarcation of scope as regards vessels adopted in various international conventions of earlier date. The scope of this review was limited to international Labour Conventions and other general conventions adopted subsequent to the World War. No attempt was made to consider the preparatory work of the Conventions concerned, and only in the case of international Labour Conventions was any reference made to the criteria adopted in the legislation by which they are applied, but, incomplete as this review therefore was, the position revealed by it is of interest, and can be stated thus in tabular form.

A. International Labour Conventions.

1. The Minimum Age (Sea) Convention, 1920, the Unemployment Indemnity (Shipwreck) Convention, 1920, the Minimum Age (Trimmers and Stokers) Convention, 1921, and the Medical Examination of Young Persons (Sea) Convention, 1921, all apply to " all ships and boats, of any nature whatsoever, engaged in maritime navigation, whether publicly

or privately owned " but excluding ships of war. They include no words purporting to limit the obligations assumed by Members by ratification by any criterion of nationality, flag or registration. Certain Members of the Organization have, however, thought it necessary to include in the legislation by means of which they apply these Conventions some such criterion. It appears from the annual reports made under Art. 22 of the Constitution of the Organization and from legislation referred to in these reports that in Great Britain, Canada, India, the Irish Free State and Cuba the criterion of registration is adopted, whereas in Belgian, German and Polish legislation reference is made to the flag. In some " flag " countries, however, registration is the criterion which determines whether a vessel is entitled to fly the flag. In other legislations, as in those of France and Yugoslavia, there is a general reference to national vessels (*e.g.* to French vessels and to vessels of the Yugoslav national mercantile marine), while in still other legislations, such as those of Denmark, Norway, Sweden, Finland, Estonia, Japan and Spain, there is no reference to any criterion.

2. The Inspection of Emigrants Convention, 1926, provides that :

> If an official inspector of emigrants is placed on board an emigrant vessel he shall be appointed as a general rule by the Government of the country whose flag the vessel flies. Such inspector may, however, be appointed by another Government in virtue of an agreement between the Government of the country whose flag the vessel flies and one or more other Governments whose nationals are carried as emigrants on board the vessel. (Art. 4.)

Other provisions of this Convention (Arts. 5 and 7) refer to the laws and Government of the country of the flag.

3. The Seamen's Articles of Agreement Convention, 1926, and the Repatriation of Seamen Convention, 1926, both apply to " all seagoing vessels registered in the country of any Member ratifying this Convention."

B. Other Post-war General Conventions.

These fall into three groups : (1) Conventions adopted under the auspices of the Transit Organization of the League of Nations ; (2) Conventions adopted by the Brussels Conferences on Maritime Law ; (3) Conventions adopted at the London Conferences on Safety Questions.

1. *Transit Organization Conventions.*

(i) The Statute on Freedom of Transit, annexed to the Convention on that subject of April 20, 1921, refers somewhat incidentally to the flag as a possible basis for discrimination between vessels, such discrimination being forbidden by the Statute. (Art. 2.)[1]

(ii) The Statute on Navigable Waterways of International Concern, annexed to the Convention on that subject of April 20, 1921, provides for an absence of discrimination between " the nationals, property and flags " of Contracting States (Arts. 4 and 9) and that there shall be no discrimination "by reason of the flag." (Art. 9.)[1] The additional protocol to this Convention also requires equality of treatment for the "flags" of signatories.[2]

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[1] Hudson, *International Legislation*, vol. i, p. 632.

(iii) The Statute on the International Régime of Maritime Ports, annexed to the Convention on that subject of December 9, 1923, requires national treatment for "the vessels of every other Contracting State" (Art. 2) and subsequently provides that "the flag of the vessel must not be taken into account." (Art. 5.)[3]

2. *Brussels Conventions.*

As there is no authentic English text of these Conventions reference will have to be made to the French terminology.

(i) The Convention on the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels (August 25, 1924) includes the following provision—

> Les dispositions de la présente Convention seront appliquées dans chaque Etat contractant lorsque le navire pour lequel la limite de responsabilité est invoquée est ressortissant d'un Etat contractant, ainsi que dans les autres cas prévus par les lois nationales.
>
> Toutefois, le principe formulé dans l'alinéa précédent ne porte pas atteinte au droit des Etats contractants de ne pas appliquer les dispositions de la présente Convention en faveur des ressortissants d'un Etat non contractant. (Art. 12.)[4]

(ii) The Convention for the Unification of Certain Rules relating to Bills of Lading for the Carriage of Goods by Sea (August 25, 1924) defines its scope by reference to the place of issue of the bill of lading and not by reference to vessels. (Art. 10).[5]

(iii) The Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels provides that—

> Les dispositions de la présente Convention seront appliquées dans chaque Etat contractant sous la réserve de ne pas en faire bénéficier les Etats non-contractants et leurs ressortissants, ou d'en subordonner l'application à la condition de réciprocité.
>
> D'autre part, rien n'empêche un Etat contractant de régler par ses propres lois les droits accordés à ses ressortissants devant ses tribunaux. (Art. 6.)[6]

In reality the test in the case of this Convention is that of ownership, a test which is obviously uniquely appropriate in a Convention dealing with State-owned vessels.

(iv) The Convention for the Unification of Certain Rules relating to Maritime Mortgages and Liens (April 10, 1926) includes the following articles:

> Les hypothèques, mortgages, gages sur navires régulièrement établis d'après les lois de l'Etat contractant auquel le navire est ressortissant et inscrit dans un registre public, soit du ressort du port d'enregistrement, soit

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[1] Hudson, *International Legislation*, vol. i, pp. 647 and 650–1.

[2] *Ibid.*, p. 660.

[3] *Ibid.*, vol. ii, pp. 1163, 1164.

[4] *Ibid.*, p. 1339.

[5] *Ibid.*, p. 1356.

[6] *Ibid.*, vol. iii, p. 1842.

d'un office central, seront considérés comme valables et respectés dans tous les autres pays contractants. (Art. 1.)[1]

Les dispositions de la présente convention seront appliquées dans chaque Etat contractant lorsque le navire grevé est ressortissant d'un Etat contractant, ainsi que dans les autres cas prévus par les lois nationales.

Toutefois, le principe formulé dans l'alinéa précédent ne porte pas atteinte au droit des Etats contractants de ne pas appliquer la présente convention en faveur des ressortissants d'un Etat non-contractant. (Art. 14.)[2]

3. *London Conventions.*

(i) The Safety of Life at Sea Convention (May 31, 1929) applies "to ships belonging to countries the Governments of which are Contracting Governments, and to ships belonging to territories to which the present Convention is applied under Article 62. . . ." (Art. 2 (1).)[3]

Art. 62 provides for the application of the Convention to colonies in cases in which a Contracting Government has made a declaration of acceptance on their behalf.[4] It is further provided in Art. 2 (3) (*a*) that "A ship is regarded as belonging to a country if it is registered in a port of that country."[5]

(ii) The Load Line Convention (July 5, 1930) applies to ships "which belong to countries the Governments of which are Contracting Governments, or to territories to which this Convention is applied under Article 21. . . ." (Art. 2 (1).)[6]

Article 21 is a colonial application article which, though slightly different in wording, is to the same effect as Art. 62 of the Safety of Life at Sea Convention.

Art. 3 (*a*) of the Load Line Convention further provides that: "A ship is regarded as belonging to a country if it is registered by the Government of that country."

Registration by the Government of the country is thus substituted for registration in a port of the country, the latter being the test in the Safety Convention.

Desirability of Uniform Terminology.—It was emphasized in the Co-ordination Committee that the preliminary impression of confusion which such a review gives is not, perhaps, as justified as it might seem to be at first sight. There are substantial differences between the various Conventions which explain, even if they are not a sufficient reason for, the differences of terminology. The essential purpose of the Transit Organization Conventions, for instance, is simply to prohibit discrimination, and the test of the flag, though not necessarily specially appropriate for the purpose of expressing such a prohibition of discrimination, is at least as serviceable for this purpose as any other formula, and not open to the objections to it which arise in cases in which it is necessary to define accurately the vessels on board of which the positive obligations resulting from a Convention are to be fulfilled. It is more difficult to defend the very vague term " navire ressortissant " used in the Brussels Conventions. The phrase is so vague that it does not amount to the explicit adoption of any particular criterion, but it must be remembered that the essential purpose of the Brussels Conventions is to achieve a certain degree of uniformity in rules of law which will be applied by national courts in ordinary legal proceedings. A certain vagueness in the terminology of the Conventions may reduce the extent to which the desired uniformity is achieved, but as complete uniformity is not regarded as possible, a point illustrated by the discretion left to the parties to some of these Conventions to allow their courts to inquire into the real ownership of ships, such vagueness is not as serious as it would be in the case of Conventions imposing obligations of a regulative character, the application of which in the public interest requires regular supervision by the State. In the London Conventions, which are of this latter character, it was thought desirable to use a precise criterion, that of registration. The Co-ordination Committee felt, however, that, even if there are adequate grounds, which may be doubted, for not attempting to embody in all maritime Conventions a uniform criterion, the case for uniformity in the case of all future international Labour Conventions is irresistible. It therefore proceeded to consider what that criterion should be, and examined in turn the claims as a criterion of nationality, the flag and registration.

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[1] Hudson, *International Legislation*, vol. i, p. 1848.

[2] *Ibid.*, p. 1853.

[3] *Ibid.*, vol. iv, p. 2727.

[4] *Ibid.*, p. 2767.

[5] *Ibid.*, p. 2727.

[6] *Ibid.*, vol. v, p. 638.

Nationality Rejected as Criterion.—Nationality was considered, only to be at once rejected. It was felt that as no existing International Labour Convention adopted this criterion, and as the criterion was unusual in other international Conventions, it would be undesirable to adopt an additional variation of practice where there were already too many. Even apart from this, it was thought that the term was vague, and, because vague, confusing. Nationality might be thought to refer not to the flag flown, the right to fly a particular flag being normally, as documents before the Committee showed, determined by registration, but to the nationality of the ownership and control of the vessel, and perhaps even to the nationality of the real as distinct from the apparent ownership and control. It was pointed out to the Committee that nationality, understood in this sense, is not the criterion which determines the jurisdictional rights of States over conditions of employment on board, and that the criterion defining the obligations to be assumed by States must necessarily correspond with that which, under general rules of international law, delimits the extent of their powers of control.

Relationship between Right to Fly the Flag and Registration.—The Co-ordination Committee then considered the relationship between the right to fly the flag and registration. The report before the Committee pointed out that, although general works on international law commonly refer to the flag which a vessel flies as being the criterion which determines what State has jurisdiction on board and is entitled to apply its general legislation to the vessel, registration is normally the criterion which determines what flag a vessel is entitled to fly. It was not suggested that there is a definite rule on international law upon this subject, but reference was made to a set of rules on the use of the national flag by merchant vessels adopted by the Institute of International Law as long ago as 1896. Art. 1 of these rules states that: " The ship should be inscribed on the register kept for this purpose by authorized officials, in conformity with the law of the State," and Art. 5 that " Failure to comply with one of the conditions under which this right (*i.e.* the right to fly the flag) may be acquired does not entail forfeiture of this right until after the ship has been erased from the register." [1] The Co-ordination Committee also had before it a document published in 1931 by the Permanent Committee on Ports and Maritime Navigation of the Advisory and Technical Committee for Communications and Transit of the League of Nations.[2] From this document, which consists of replies made by Governments to certain questions put by the Permanent Committee, it appeared that the practice of the majority of States corresponds with the Institute rules and confirms the view that registration is in general the criterion upon which the right to fly the flag depends. The Co-ordination Committee therefore felt entitled to conclude that in the majority of cases the same practical result will be reached whether the criterion adopted be registration or the flag, but that logically registration is the preferable criterion, since it is the criterion upon which the right to fly the flag normally depends.

Differing Results of Criterion of the Flag and of Registration.—The next step was to consider the cases in which the criterion of the flag and the criterion of registration would give different results, and to examine the extent to which the adoption of either criterion might give rise to practical difficulties. The Co-ordination Committee noted that two Members of the Organization—Great Britain and India—still have a common maritime flag, but that ships registered in India, although they must be registered under the British Merchant Shipping Act, are, for all purposes of social legislation, subject, as a matter of constitutional usage, to Indian and not to United Kingdom legislative jurisdiction. The Committee also noted that the same difficulty extends in a slightly different form to all the colonial Powers, and that vessels upon colonial registers, though entitled to fly the national flag, will often, either as a matter of constitutional law or as a matter of constitutional usage, be subject, in respect of social legislation, to the legislative authority of the colony in which they are registered rather than to that of the home country. The Committee considered it undesirable that colonial Powers should, unless prepared to apply Conventions to all vessels flying their flag, including vessels on colonial registers, be prevented from ratifying; it was further influenced by the fact that, under the Constitution of the International

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[1] Scott, *Resolutions of the Institute of International Law*, pp. 135–6.

[2] *Comparative Study of National Laws governing the Granting of the Right to fly a Merchant Flag*, C. 248, M. 112, 1931, viii.

Labour Organization, the obligation to apply ratified Conventions to colonial territories is normally a qualified one and by the fact that constitutional and practical difficulties will often retard such application; and it felt that it would be artificial and confusing to adopt the flag as a criterion and then to provide or imply that vessels flying the flag will not necessarily be covered if in some undefined way they can be regarded as colonial vessels. The view of the Committee was that any danger which there may be of attempts being made to evade the application of Conventions under which registration is the criterion by the transfer of vessels to colonial registers can only be met by the progressive application of such Conventions to colonial territories, and not by purporting, by the choice of the flag criterion, to place upon States a more far-reaching obligation than they can conveniently, or in some cases constitutionally, perform. The flag criterion was therefore rejected, largely in deference to the difficulties of States with colonies.

Possible Objections to Criterion of Registration.—The Committee's next duty was to consider possible objections to the registration criterion. It noted that in a number of countries vessels below a certain size are exempt from registration, but concluded from the League of Nations document already referred to [1] that vessels exempt from registration are normally of so small a tonnage that it is of small importance that International Conventions should apply to them. The Committee considered that if registration were adopted as the criterion in International Conventions, the term "registration" as so used would cover the special systems of issuing documents to small vessels between which and registration the legislation of certain countries draws a distinction. The Committee also considered the relation between the criterion of registration and the position of vessels sailing under temporary nationality certificates which, under the laws of many countries, may be granted by their consuls abroad to vessels built or purchased there for their nationals. In view of the strictly temporary character of these certificates, the Co-ordination Committee refrained from making any proposal as to the status under the Conventions to be adopted by the Conference of vessels sailing under such certificates.

Formula for Criterion of Registration.—Having determined that registration was the most appropriate criterion, the Committee had to consider how that criterion should be expressed. It rejected the formula used in the Safety of Life at Sea Convention, which refers to registration in a port of the country which is to be responsible for the vessel, on the ground that vessels are not always registered at ports. Registration in a territory for which the Convention in question was in force appealed to the Co-ordination Committee as a more appropriate formulation of the criterion. The existence of anomalous cases in which countries maintain registers outside their own territory (*e.g.* the British registers at Shanghai, the Greek registers in London and Constantinople, and the Japanese registers in China) were brought to the Committee's attention, but it decided to disregard these cases. The proposals of the Co-ordination Committee were approved by the Selection Committee (the steering committee) of the Conference, and there was therefore included in each of the Conventions adopted by the Conference a phrase stating that it applied to vessels " registered in a territory for which this Convention is in force," and fulfilling such other conditions as were judged desirable in the case of each particular Convention.

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[1] C. 248, M. 112, 1931, viii.

Conclusion.—The foregoing account of the work of the Co-ordination Committee of the Twenty-first Session of the International Labour Conference is not intended to be more than a brief record of one effort to frame for five important Conventions a common definition of the vessels in respect of which each party to the Convention assumes responsibility. It is not suggested that the information before the Committee was complete, and it is not denied that the Committee may have overlooked elements of the problem which are of importance in connexion with other groups of Conventions, but, in view of the desirability of securing the greatest possible uniformity in the terminology employed in different groups of international Conventions upon related subjects, it is reasonable to hope that the work performed by this Committee will not be overlooked, and that registration will perhaps commend itself as the most satisfactory criterion to those responsible for other groups of Conventions.

EARLY DANISH CRIMINAL LAW.[1]

[*Contributed by* A. W. G. KEAN, ESQ.]

THERE is no subject more interesting to the historian and psychologist than early criminal law. It is our purpose in this essay to examine two early Danish Codes, the Jutland Law of Valdemar II (1201–1241), and King Erik's Zealand Law, which was probably composed by Erik Menved (1286–1318). We shall consider (1) the range of the criminal law; (2) the nature of the criminal law; (3) the principles of liability; (4) the procedure by which the law was enforced. In conclusion we shall attempt a comparison of the early Danish with the early English criminal law.

The Range of the Criminal Law.—The range of offences covered by the two codes is not unlike that of any modern system of law. The new crimes of possessing unlicensed motor-cars or wireless sets, or of selling cream with too much preservative, do not, of course, exist, but ancient Denmark knew most of our modern offences, such as homicide,[2] wounding,[3] robbery,[4] theft,[5] receiving stolen goods,[6] arson,[7] coining.[8] Of bigamy there is no sign, because it was dealt with by the priests. On the other hand, there are one or two offences which would seem strange to-day, such as sorcery[9] and violating a holy-day.[10] Often the place where it is committed aggravates the offence.[11] Highwaymen are dealt with apart from ordinary robbers.[12] "Hiort-" and "Marcke-Ran" (land- and field-robbery) are special offences.[13] "Hærværk" resembles a combination of English burglary, the essence of which is breaking into a house, with Roman *injuria*, the essence of which is insult; for when the special peace of the house is broken, that is a serious injury.[14] He who kills another at the Thing forfeits all his goods to the Crown.[15]

The Nature of the Criminal Law.—Though early Danish criminal law is similar to modern law in its extent, it differs from modern law in that its primary aim is not only punishment of the offender but also compensation of the victim. Vengeance is commonly accepted as the root of all primitive legal procedure.[1] Eventually, the blood-feud gives way to a system under which the would-be avengers are bought off by the offender under the supervision of the community. It is only at a later time that punishment proper begins, and that harm is inflicted on the offender by the community as a whole. Thirteenth-century Danish law belongs to all three periods: in some cases vengeance is allowed; in others, the offender must buy off the victim or his relations; in others, the offender is punished either by a fine to the King or by the forfeiture of his life.

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[1] The texts of Valdemar II's Jutland Law and King Erik's Zealand Law that have been used are those in Kolderup-Rosenvinge's *Samling af Gamle Danske Love* (Copenhagen, 1821 and 1837). In the references, V. = Valdemar II's Jutland Law; E. = King Erik's Zealand Law.

[2] V.2.88.

[3] V.3.36.

[4] V.2.40.

[5] E.3.52.

[6] V.2.96.

[7] E.2.14.

[8] V.3.65.

[9] V.3.64.

[10] V.2.49.

[11] Compare larceny in a dwelling-house in English law to-day.

[12] V.3.67.

[13] V.2.46.

[14] Dahlerup's Dictionary says of Hærværk: "It signifies that several armed men assaulted a man in his house, caused him or his family to be molested or carried off, damaged his property." The literal meaning of Hærværk is "army-work."

[15] E.2.4.

It is rare, in our two codes, for the victim to have the right to kill the offender without further ado. There seems to be only one case: a husband finding his wife in adultery may kill both wife and lover, provided that he takes the eiderdown and sheet to the Thing while they are still bloody, and has two witnesses, so that it cannot be denied that he found them together.[2]

In other cases, the right to take vengeance is watered down. He who is caught in the act cannot be killed outright; instead of vengeance, his victim will have the satisfaction of knowing that he is to be punished by the Thing without trial, and to suffer a severer punishment than if he had not been caught in the act.[3] Valdemar, under the heading "Om Mordbrand,"[4] provides that he who, in the silence of the night, or in any other secret way, sets fire to another's house shall, if caught in the act, be condemned to death and pay for the damage, together with a penalty of forty marks. But if he is not caught in the act, but is legally condemned, he is only to pay for the damage and flee the land until he has the King's pardon. The highwayman, if caught in the act, shall lose his life and inheritance, but if legally condemned shall merely pay for the loss, together with a penalty of forty marks, his life being at the discretion of the King.[5]

Sometimes the victim's desire for vengeance is put to a procedural use in order to bring the accused before the court. If a man catches another red-handed in theft, or finds him in his house in the silence of the night, so that there can be no doubt that he meant to steal, he may bind him and lead him to the Thing.[6] If a man suspects another of theft and catches him with the stolen goods, he must tie them to his back and lead him to the Thing.[7]

Outlawry provides another way in which the victim or his relations may lawfully take vengeance on the offender. He who wrongly refuses to pay compensation for homicide,[1] and he who kills an offender after compensation has been paid,[2] shall be outlawed. This means that any one is at liberty to kill him. Erik's law provides that an outlawed man shall not enjoy the peace of the Thing, except on the day on which he was condemned, when he shall go away in peace and escape; that night he shall have peace, so that he can seek out a wood and find help. After that, if he is attacked, he must defend himself as best he can.[3]

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[1] *Cf.* Holmes, *The Common Law*, Lecture 1; Westermarck, *Origin and Development of the Moral Ideas*, vol. 1 *passim*; Kennett, *Bedouin Justice*, 30; Monrad, *Guinea Kysten og dens Indbyggere*, 88.

[2] E.2.1; V.3.37.

[3] Compare *furtum manifestum* in Roman law.

[4] V.3.66.

[5] V.3.67. The highwayman is described as "he who lies in a wood or hiding-place, or on a heath, or on a high-road, and robs either a man who rides, or goes in a cart or on foot; and afterwards seeks a hiding-place and conceals the deeds."

[6] V.3.95.

[7] V.3.87.

Vengeance in the sense of a physical attack on the offender is very strictly confined. In general, the victim is bought off by means of monetary compensation ("böde"), which is usually of three or forty marks. An elaborate system of tariffs is laid down. Three marks must be paid for a malicious accusation of robbery,[4] forty marks for stealing clothes, arms, gold or money from a corpse,[5] three marks for any kind of robbery,[6] and so on. Erik provides[7] that if a man seizes another by the hat, cap or hair, and pulls or pushes him in anger, or smites him with hand or fist and casts him to the ground, he shall pay three marks. Hærværk gives a right to forty marks compensation. Valdemar[8] lays down the tariff for injuries to various parts of the body:

> If a man loses his tongue or nose or both eyes or both hands or both feet, . . . then there must be paid for each of these full Man's-bot. And if a man loses one eye or one hand or one foot, for each of these half Man's-bot must be paid. And if a man loses one ear, then, because it must be concealed with hat and with hair, a quarter Man's-bot must be paid for it; for a thumb a quarter Man's-bot must be paid, and for the other four fingers [together] also a quarter Man's-bot; yet for each of the next two [alone] there shall be paid an eighth part of a Man's-bot, and for the two outside fingers the sixteenth part of a Man's-bot.

Where one man kills another, he himself must pay one-third of the compensation, his paternal relatives one-third and his maternal relatives one-third.[9] It must be shared out among the deceased's relatives in a similar way; one-third goes to the paternal and one-third to the maternal relatives, and the deceased's share goes to his issue, failing them to his father and brothers, according to the law of inheritance.[10] If the killer refuses to pay compensation, he is outlawed, and the claim to compensation must be made directly against his paternal and maternal relations. If a man says he is not the nearest relation, witnesses shall come from the hundred, and a jury shall decide this. If he is found to be the nearest relation, he shall give compensation on the security of his dwelling-house, or be outlawed. If, after he has been outlawed, the victim's relatives wish to pursue the claim further, they can repeat the procedure against the two relatives' next of kin, but after that, they must abandon the claim.[11]

[1] E.3.30.
[2] E.2.5; V.3.23.
[3] E.2.18.
[4] V.2.40.
[5] V.3.24.
[6] V.2.48.
[7] E.2.43.
[8] V.3.25.
[9] E.2.38.
[10] E.3.28.
[11] E.3.30.

Though vengeance bought off by compensation is the usual consequence of crime, there are signs of the beginning of purely punitive law, in which the community inflicts harm on the offender that in no way benefits his victim. Often compensation to the victim is accompanied by a fine to the King, as compensation for breaking his peace. It is from the notion of compensation for breaking the King's special peace that punitive justice grows. In Valdemar's and Erik's codes, the law rarely goes beyond this stage. For homicide, nine marks must be paid to the King, six for breaking his peace and three for spilling blood.[1] Accessories to homicide must fast, stand outside the church, and pay three marks to the King. Stealing property worth less than half a mark involves a fine of three marks to the King, but if the property is worth more than half a mark, the offender's life is forfeited, and his wife and children must pay three marks.[2] Accessories to Hærværk pay three marks to the King.[3] He who is convicted of robbery must, in addition to making it good and paying a penalty of three marks to his victim, pay three marks to the King.[4]

Sometimes, however, the offence has been made non-emendable, and the King's vengeance cannot be bought off by payment of money. He who commits arson, or robbery on a highway or heath, shall, if caught in the act, be put to death.[5] He who burns another to death shall himself be burnt to death, or shall be broken on the wheel.[6]

The Principles of Liability.—Upon what principles were compensation and penalties exacted in early Danish law? The problem is this: I hold a spear which somehow injures you: am I to be liable to pay compensation and penalty, either to you or to the King, whether I meant to do the damage or not?

We have seen that in early Danish law, as in many other systems, vengeance was the mainspring of legal procedure: upon what principle was vengeance taken? Holmes thought that vengeance was taken in primitive law only in circumstances in which it would be taken to-day; that is to say, only upon the deliberate wrongdoer.[7] Even a dog, he wrote, can distinguish between being stumbled over and being kicked. The rival theory maintains that vengeance was taken whether the wrong was intended or not. Civilized man kicks a door that has pinched his finger. We must not suppose that since in general civilized man does not desire vengeance except for deliberate wrongdoing, his ancestors were not affected by different emotions in the same circumstances.[8]

There is in early Danish law evidence to support the second view. The position is that where a man unintentionally commits a wrong, he must buy off the injured man's vengeance by paying him compensation; but with regard to the penalty to the King the law has advanced, and nothing need be paid to the Crown unless the injury is intentional. It would be rash to say that in crime intention is essential but in tort it is not, for there is no distinction, procedural or otherwise, between crime and tort in early Danish law. But it is clear that unintentional wrongs must be made good, while no punishment need be suffered except for wrongs that are intentional.

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[1] E.3.46. [2] E.3.52. [3] E.3.48. [4] V.2.40.
[5] V.3.66, 67. [6] E.2.15. [7] *The Common Law*, lecture 1.
[8] Westermarck, *Origin and Development of the Moral Ideas*, i *passim*; Wigmore, *Principles of Tortious Liability*, *Anglo-American Legal History*, iii.

For example, he who carries arms and unwittingly wounds another must pay compensation to the injured man, but not to the bishop or the King.[1] He who wounds by accident, whether by striking, throwing or shooting, shall pay compensation, but nothing to the bishop or the King.[2] If anyone is accused of violating a holy-day, he must swear that he did it unawares, and if the jurors, who ought to know this, swear that he did it unawares, then he shall pay satisfaction to the injured man, but not to the bishop or the King.[3] If a child under 15 injures another, he must satisfy the injured man, but need not pay anything to the bishop or the King,[4] for he is too young to be capable of criminal intention.[5]

The early Danes seem to have had no clear conception of causation and remoteness of damage. If somebody was drowned in my fountain[6] or injured by my sword, even though it was wielded by another, I must pay compensation.[7] If my horse, swine, dog or other animal kills another, I must pay nine marks. But if I have "wylld dyur,"[8] such as a wolf, a bear, or their cubs, and they escape, I need not pay for the damage they do, since they cease to be mine as soon as they are out of my control.[9]

It is probable that in Danish law, as in Roman and English law, payment for damage done by one's property, animate or inanimate, was the means of avoiding surrender of the property for vengeance to be taken upon it. There is one trace of this in our sources: if a thrall kills a free man, he shall be handed over by his master to the relatives of the deceased.[10]

The Procedure by which the Law was Enforced.—We have seen that proceedings may sometimes be initiated by the capture of the defendant by the plaintiff.[11] The thief caught red-handed may be bound and taken to the Thing.[12] If the plaintiff finds the stolen goods in a suspect's possession, he may tie the goods to the suspect's back and lead him to the Thing.[13]

A second way in which proceedings may be initiated is that a man may swear that another has committed an offence. We are told that he who swears robbery against a man and fails to prosecute must pay three marks to the man and three to the King.[14]

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[1] V.3.36. The compensation to the bishop was for the sin; to the King, for the crime.

[2] E.3.15.

[3] V.2.49.

[4] V.2.50.

[5] Liability to punishment seems to depend on intention alone; negligence never seems to have been considered sufficient.

[6] V.2.37.

[7] E.3.13.

[8] *I.e.* wild animals.

[9] V.2.35. The Roman law was the same; Buckland, *Manual*, p. 333.

[10] E.2.32.

[11] *Supra* p. 254.

[12] V.3.95.

[13] V.3.87.

[14] V.3.41.

A third way, similar to the Grand Jury in England, is that the jurymen (" nefningæ ") present on oath persons suspected of crime.[1]

When proceedings have begun, the accuser or plaintiff pleads, the accused replies, and then the accuser speaks again; after this third plea, the case is adjudged to the jurymen, who must swear what is right.[2] The jury, consisting of eight men from the hundred, two from each " fierthing," is nominated by the inhabitants before the " Umbæsman " (sheriff), or, failing such nomination, by the sheriff himself. They take an oath to tell the truth without favour.[3] They are given at least a week in which to make inquiries.[4] If the jury is equally divided, three juries shall be brought from the nearest hundred, and whatever two of them decide shall stand.[5] The jury are bound to consult the better men of the hundred; even though they are unanimous, if they swear contrary to the opinion of the majority of the best men in the hundred, they must pay a penalty.[6]

Sometimes, where the affair is very serious, the case is decided by a larger and more dignified jury. A man who kills an offender after he has paid compensation is to be outlawed; if he says he had another just cause for killing, and his opponent denies this, then a jury of sixteen of the best men in the neighbourhood shall be chosen. Of these the accused may cast out three. If those that remain swear that the deceased was killed for a cause other than that for which he had paid "böde,"[7] his death may be compensated for; if they swear otherwise, the accused shall be outlawed.[8]

An alternative means by which the case could be decided was wager of law. He who lends arms to another who does damage with them shall, if he is charged with plotting the damage, defend himself with the oath of twelve men.[9] He who possesses stolen goods may prove with the oath of twelve that he is not a thief and did not know of the theft.[10] A thief who says he took the property by accident, or because he thought it was his own, shall " tage sin Ret " (wage his law). " End brøster hannem Low " (If his law bursts), he shall pay compensation and penalty.[11] In England, too, if the defendant failed to wage his law, his oath was said to burst.

If the accused is convicted and refuses to pay the penalties, the successful plaintiff may go to his house, after an interval of five days, and take his compensation, together with a fine of three marks.[12] But if the offence is homicide and the convicted man refuses to pay, he is outlawed, and the plaintiffs may kill him, after he has been given time until the following dawn in which to get help and conceal himself in a wood.[1] He who kills the offender after compensation has been paid shall return the money and be outlawed at the discretion of the King.[2]

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[1] V.2.40.

[2] V.2.42.

[3] V.2.51. The terms of the oath by which they bring in their verdict are (V.2.43): " So help me God and the Holy Book, I affirm that this man stole from the other what he was charged with stealing, and is therefore guilty and worthy of outlawry, and ought to pay for this three marks to the peasant and three to the King."

[4] V.2.53.

[5] V.2.55.

[6] V.2.42.

[7] "Böde" is the equivalent of the Anglo-Saxon "bot."

[8] E.2.5.

[9] V.3.35.

[10] V.2.96.

[11] V.2.40.

[12] V.2.59.

Conclusion.—Valdemar II's reign coincides with the early years of our English Bracton, and Erik Menved's with the years following Bracton's death. How does the Danish criminal law in these two codes compare with the English criminal law of the time? The Danish law is very different from the law in Bracton: it closely resembles the Anglo-Saxon law to be found in the Leges Edwardi, Leges Williami and Leges Henrici. As in these laws, compensation buys off vengeance; sometimes there is a penalty to the King, and sometimes the physical penalty cannot be bought off with money. The principle of liability seems to be that compensation, but not penalty, must be paid for unintentional wrong. There is no conception of a doctrine of remoteness damage, but merely a system of paying money to prevent vengeance on one's property. Questions of negligence never seem to be considered.

In procedural matters, however, thirteenth-century Denmark is as far advanced as thirteenth-century England, and the law of the Anglo-Saxons has been left far behind. The presenting jury is in operation. There is no sign of the ordeal, though, as in England, wager of law remains. Instead of the ordeal, a jury inquires into the facts, with the aid of the best men of the hundred.

There were many reasons for the more rapid advance of the substantive law in England. It is not our purpose to explain why, in the time of Bracton, crime and tort were becoming distinct, or why the enlightened principles of the canonists were beginning to find their way into the English principles of liability. It must be sufficient for us to notice the main reason, that in England royal justice was stronger stuff than it was in Denmark, and that the conquering Normans were able to send round the countryside royal and professional justices who moulded the law into something better than it had been before. Denmark had no William I, no Henry I and no Henry II.

[1] E.3.30; 2.18.

[2] V.3.23.

CIVIL SERVICE LAW IN GERMANY.

[*Contributed by* DR. JUR. H. TASSE, *Barrister-at-law.*]

THE German law relating to Civil Servants differs as between the Reich and the various States, and the State law is subdivided in rules as to the officials serving the State itself and those serving a self-governing local authority, for the officials of the local government are in Germany—in difference to this country—regarded as " indirect " Civil Servants who enjoy the same rights as an ordinary Civil Servant although appointed by, and responsible to, a local authority. The following explanations apply therefore *mutatis mutandis* to the officials of the local government.

For the most part the law of the Civil Servants in Germany is laid down by statute. The Act dealing with Reichs Civil Servants was passed in 1907. After the substitution of a unitary form of government for the former federal system, in 1933, a statute was enacted the provisions of which applied also to the Services of the various States and local authorities.

This Statute defines a Civil Servant as a person who stands to the State in a " special relation of service and faith." Under the Act the future Civil Servant will not attain this position until he is given a document calling him to the service. Before the amendment it was not quite settled when a person began to be a Civil Servant, for not only did the qualifications vary from State to State, but in addition the courts took conflicting views on the matter. The only thing which was clear was that the oath of allegiance to be taken by a Civil Servant was not essential in this connexion, as it was only his first duty to take it after becoming a Civil Servant. The Supreme Court in a case reported in R.G.Z., vol. 84, p. 220, ruled that merely to act as a member of the Civil Service was sufficient to confer the status of a Civil Servant, even in the absence of a formal appointment and even though there were no intention to confer such status.

Every German citizen is eligible for appointment to the Civil Service. For some posts it is essential to pass the Civil Service or Bar examination, while under the amendment of 1933 a candidate must be of Aryan blood, and a woman can only be called if 35 years of age or over.

It is an established rule of German law that once a Civil Servant a man is a Civil Servant for life. In this respect he is in a better position than his English colleague, who can be dismissed at the discretion of the Crown. The relation between the Civil Servant and the State in

Germany is not to be regarded as a civil law contract of service, but it is a "submission" (*Unterwerfung*) of the future Civil Servant whereby he becomes a part of the State itself. This idea influences the whole law of the Civil Service. As a Civil Servant is a part of the State, the State has a duty to support him by paying him a salary, which must be high enough to enable him to live according to the standard set by his profession. This rule places the Civil Servant completely under the tutelage of the State, which must continue to support him even after his retirement from the service. Unlike an English Civil Servant, a German Civil Servant can bring an action for his salary and pension against the State, a right which is guaranteed by the Constitution of 1918 itself, under Art. 129. Furthermore, he cannot be dismissed "at His Majesty's Pleasure"; the only way in which he can be expelled from the service is by decision of a special court of honour, which is composed of judges and high officials who enjoy judicial independence. A Civil Servant, furthermore, cannot be translated from one office to another unless the general efficiency of the administration would otherwise be impaired.

On the other hand, the Civil Servant has special duties of allegiance, of obedience, of residence and of secrecy, the particulars of which are laid down in the various State Acts.

The question of the responsibility of a Civil Servant for acts done in his official capacity is a very important matter. The law on this subject in Germany differs in many ways from the corresponding English law.

If a German Civil Servant contracts in the name of the State, he never binds himself by so doing, and will never be directly responsible for his acts. We find similar rules laid down with regard to the English Civil Service in many leading cases, such as the old case of *Macbeath* v. *Haldimand*, (1786) 1 T.R. 172. If a German subject is damaged by the breach of a contract made by a Civil Servant, he always has a right of action against the State, in the same way as a Petition of Right is available in this country.

But fundamentally different views prevail in England and Germany on the question of delictual liability. In English law "the King can do no wrong." Thus an action in tort can be brought only against a Civil Servant himself, and not against the Crown, whose representative he is, as it was decided in the case of *Viscount Canterbury* v. *A.-G.* (1842) 1 Phil. 306. The position is different in Germany. The matter is rather complicated. The following represents its principal provisions:

The liability of a Civil Servant in tort is regulated by s. 839 of the German Civil Code. This section recognizes a right of action against a Civil Servant in respect of his tortious acts, but only subject to certain conditions designed to protect him in the discharge of his duty. Thus, in order to maintain such an action, the plaintiff must first prove that no other remedy is available. If a Civil Servant has only acted negligently, no claim for damages will lie if there is a right of indemnity against another party. Furthermore, such an action will lie only if the Civil

Servant has failed to discharge his duty to the public, and not where he has merely failed to carry out the instructions of his superior.

But not in all cases where the plaintiff has a claim of this kind is he referred to an action against the Civil Servant himself. Where the Civil Servant acts in the name of the State as such and not in the name of the State carrying on business as a private corporation—in the working of mines, railways, etc.—the responsibility is taken over by the State. So, if a citizen is damaged by the acts of a Civil Servant acting for the State as such, he may bring an action against the State and only against the State; an action against the Civil Servant himself would not succeed. The object of this is to give the Civil Servant greater freedom of action, and to prevent him from being fettered by the fear of incurring personal liability for his acts, while at the same time ensuring that the public shall not be prejudiced thereby. The public indeed derives an additional benefit from the section, inasmuch as its rights thereunder are secured by the certain credit of the State, and not merely by the doubtful credit of an individual Civil Servant.

This idea was first expressed in a Prussian statute of 1909. In the following year, the Reichs Government adopted the same principle, and by the Constitution of 1918, Art. 131, this was extended to the whole German Civil Service. The liability of the State under Art. 131 of the Constitution is subject to the same conditions as was formerly the liability of the Civil Servant himself, and an action against it will lie only in the cases provided for by s. 839 of the Civil Code. Under the Statutes of 1909 and 1910, which relate only to Prussia and the Reich, the State assumes an additional liability for the official acts of a Civil Servant while insane.

The State has a right of indemnity against a Civil Servant which is still governed by the old Reichs and State Statutes. This right of indemnity extends even to cases of mere negligence. To this rule, one important exception may be mentioned: the officials of the Land Registry are not liable to indemnify the State in case of slight negligence, although the State itself is responsible to the public for all negligent acts of these officials.

Coming back to the case where a Civil Servant is acting for the State carrying on business, it may be possible in certain circumstances to sue the State directly instead of proceeding against its agent. The State is here regarded by the law as a corporation and under German law every corporation can be made liable for the torts of its " organs "—that is to say, of the persons occupying those offices which are named in the instrument creating the corporation as constituting its governing authority (*cf.* ss. 89, 31 Civ. Code). The State is entitled to indemnity against the Civil Servant, the rules as to the indemnity being laid down by the laws of the various States.

While these represent the rules as to ordinary Civil Servants, special rules apply to some classes of officials which confer on them a greater or less immunity. A larger measure of immunity is enjoyed by the judges. Similar laws are in force in relation to these, as in the case of English judges under the Act of Settlement of 1701. But unlike in England, the judges of the lower courts as well as those of the higher enjoy this extended immunity. No judge can be transferred to another place without his consent except by the decision of a court of honour or where an alteration in the organization of the courts makes it necessary. Furthermore, only the court of honour is able to dismiss a judge. This judicial immunity is guaranteed by the Constitution of 1918, Art. 104.

On the other hand, the so-called "political officials" (*e.g.* Under-Secretaries of State, Presidents of Government Departments, Public Prosecutors) can be dismissed without any reason being assigned. In virtue of the principle that a Civil Servant is a Civil Servant for life, they enjoy in such case the right to continuing payment of a salary. By contrast, however, with all other classes of Civil Servants who cannot as a rule, as pointed out above, be deprived of the right to their full salary, the so-called "political official" is entitled on dismissal only to a percentage of his former salary.

The enactments of 1933 and 1935, whereby non-Aryan and politically unfit judges and Civil Servants were dismissed, may be mentioned in passing as exceptions to the ordinary rules stated above that a dismissal of a judge or Civil Servant is not possible except by decision of a court of honour.

The law relating to the status of the Civil Servant has recently been codified by a Statute which came into force on July 1, 1937. It is applicable to all Civil Servants throughout the Reich whether in the employ of the Reich itself, of a State, or of a local authority, and declares all of them to be Reich Civil Servants either mediately or immediately. The Statute sets out in detail the oath which the Civil Servant has to swear to the Führer, and the duties and rights of the Civil Servant. It does not affect the rules of responsibility for torts as set out above. In view of the peculiar relationship between Civil Servant and State which has been explained in the article the higher duty of allegiance which he owes to the State does not cease with the termination of his office and is extended to his relatives after his death. The Statute lays down the new rule that no man can become a Civil Servant until he is 27 years of age. There are new provisions which automatically terminate the service, if the Civil Servant ceases to be a German subject, if he moves his domicile to a place abroad without permission or if he is convicted of any serious crime. A supplementary Order passed at the same date introduces a uniform procedure in the courts of honour throughout Germany and gives the National-Socialist Party a share in the administration of the law in these courts.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L., LL.D.]

The Regency Act.—The Regency Act is of a very different type from that of 1910, for it is devised to meet not merely the case of minority of the sovereign, but also the contingency of incapacity through illness and other circumstances. The motive, of course, for the extension of provision was the inconvenience felt at the time of King George V's illnesses in 1928 and 1936, when he had great difficulty in signing the warrants for the issue of letters patent empowering counsellors of state to act, and probably also the dispute which arose from the question of the propriety of including members of the Government in the number of the counsellors. In practice the royal personages alone acted for the Irish Free State. The new Act covers, first, the case of minority up to age eighteen, postponing until then the obligation to take the accession oath and declaration in respect of the Churches of Scotland and England. Secondly, it empowers any three of the wife or husband of the Sovereign, the Lord Chancellor, the Speaker of the House of Commons, the Lord Chief Justice and the Master of the Rolls to bring into operation a Regency by declaring the Sovereign by reason of infirmity of mind or body incapable, or for some definite cause not available, for the performance of the royal functions. The wide terms of this power are due to amendment in the Lords, and they would cover not merely detention in a foreign country on outbreak of war, but also absence in a Dominion and inability to return in a crisis, and even the refusal of the Sovereign to exercise his powers, or his desire to abdicate, should it be thought better to resort to a regency rather than arrange for a demise of the throne. As a like provision is made for the incapacity of the regent, the contingency of a regent refusing to act is duly covered. The regent is, naturally, the next in the line of succession, if a British subject of full age and domiciled in some part of the United Kingdom. The provision as to domicile is unfortunate. The original intention was to require residence, and to meet the objection that the person concerned might be acting as Governor-General of a Dominion, the amendment to "domicile" was adopted, ignoring the fact that a prince who might not be interested in Britain might be domiciled therein, and that, as domicile is a matter often hard to decide, it should never have been used of anything so important as a regency. Is a Bill duly passed if assented to by a person who is not legally qualified to be regent? The fact that an issue is not likely to arise does not make it desirable to run the risk of it arising. It is clear that "normally resident" would have sufficed. The oaths of the regent depart from the coronation oath in requiring him to maintain the Protestant religion as established by law in England and in Scotland, not in the United Kingdom. The new form is not quite exact, as in law England includes Wales and does not include the Isle of Man and the Channel Islands in which the Church of England is established, but, as Welsh nationalists let it pass unquestioned, it is innocuous.

The Counsellors of State.—Delegation is permitted in illness or absence by letters patent, and may apply to all powers except the creation of a peer, or the dissolution of Parliament otherwise than on the express instruction of the Sovereign, which may be given by telegraph. The counsellors, therefore, could not swamp the House of Lords. The regent is not restricted in any way save that he may not assent to a Bill to alter the succession or to repeal or alter the famous Act of 5 Anne to secure the Protestant religion in Scotland. These matters are not expressly withheld from the counsellors, no doubt because the power to delegate allows the King to limit their authority. The counsellors must be the royal spouse and the next four in the line of succession eligible for the regency. That introduces once more the unlucky element of "domicile," which has to be considered for four cases. The counsellors and the regent alike must be and remain Protestants on pain of losing their positions.

The Dominions and the Regency.—A very difficult point arose and was evaded in Parliament regarding the relation of the Dominions to the Act. The legal position, however, is plain enough. The regent can exercise the royal activities for the whole of the Commonwealth, with the following exceptions: in the Union of South Africa only the King or the Governor-General can act; in the Irish Free State under the Constitution of 1922, as amended by the Executive Functions (External Relations) Act, 1936, only the King can act, and under the Constitution of Eire, 1936, only the King or the Government, and the King only in regard to certain specified external affairs. Canada is left unprovided for, except that the Governor-General has the necessary powers for most purposes. But for external affairs the matter differs, and it must remain dubious if the regent could act validly in treaty matters. If Canada had requested and consented to the Act under s. 4 of the Statute of Westminster, a needless ambiguity would have been removed, for it is impossible to say with any confidence that either the Dominion or the provinces could legislate as to a regency. The position as regards counsellors of state is less easy. It may be that the royal prerogative was valid to create counsellors to perform any function of the King in respect of a Dominion as in 1928, and that the only effect of the Act is to restrict the right of choice, without affecting the prerogative position. It must, it may be added, remain curious that the King was not allowed to select those of his kin whom he desired to have as counsellors of state.

The New Coronation Oath.—There are important changes in the new form of the coronation oath as used on May 12, sound in principle, but raising legal difficulties. The Union of South Africa naturally insisted, in pursuance of the doctrine of the distinct character of the Crown of the Union, on proposing to have a separate oath for the King as Sovereign of the Union but luckily deferred to the opinion of the United Kingdom and the other Dominions and accepted a common oath. The form[1] adopted, therefore, omits the former assertion, of historical importance in the struggle with the American colonies, of the subordination of the Dominions to the United Kingdom and of the supremacy of Parliament, and, very properly, merely requires the King to swear "to govern the peoples of Great Britain, Ireland, Canada, Australia, New Zealand, and the Union of South Africa, of your possessions, and the other territories to any of them belonging or pertaining, and of your Empire of India, according to their respective laws and customs." "Ireland" is from the Royal title under the Royal and Parliamentary Titles Act, 1927, and was acquiesced in by Mr. de Valera, incidentally thus helping the view that Irish citizens now born in the State are none the less, outside the State at least, still British subjects as born in the dominions and allegiance under the British Nationality and Status of Aliens Act, 1914, s. 1. The list of the territories of the Crown in the wide sense given in the Official Souvenir Programme is remarkable for the omission of the Sudan, which is held in condominium with Egypt, and which was, prior to the treaty of 1936, under the effective exercise of sole British sovereignty. No doubt the deliberate omission of the territory, while the mandated territories were included, despite the absence of any formal sovereignty at all, is to be ascribed to the desire to conciliate Egyptian opinion, the loyalty of Egypt to the new alliance being patently of first-class importance in view of the rise of Italian ambitions for hegemony in the Mediterranean, recently emphasized by the establishment of a naval command in Libya. The New Hebrides likewise were not mentioned, but obviously could be deemed to be included under the High Commission for the Western Pacific. The other vital change was the restriction to the United Kingdom of the obligation to maintain the Protestant reformed religion established by law. It has already been pointed out that there is a discrepancy between this form of oath and that of the regent; there is no established Church in Wales or Northern Ireland. But as regards both changes, legal sanction seems distinctly lacking. The omission of the supremacy of the laws made in Parliament is, of course, inapplicable to any parts of the Empire except the Dominions, and in law in their case only Canada,[2] the Union and the Irish Free State have so far been exempted from Imperial supremacy by the Statute of Westminster. In the case of religion the restriction to the United Kingdom has no legal sanction at all. The oath is prescribed as necessary by the Act of Settlement, to which the King owes his throne; its terms were defined by the Act 1 Will. & Mary, c. 6, and the power to vary them seems to belong only to Parliament. The dispensing power can in view of the Bill of Rights hardly be relied upon, else it could be used to override the provisions imposing the Protestant religion on the Sovereign. It seems unfortunate that Parliament was not asked to sanction changes, in themselves reasonable and not opposed. But the sanctity of oaths is doubtless on the decline generally and the coronation itself has rather degenerated into a great spectacle than a solemn religious confirmation of a secular title.

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[1] Cf. *Journ. Comp. Leg.*, Third Series, vol. xviii, pt. iv, p. 277.

[2] The Canadian Constitution rests still on Imperial Statutes.

The Constitution of Eire.—The Irish Free State held aloof from the coronation as from the contemporaneous Imperial Conference, thus marking its resentment of the British connexion. Logically it could have been represented at either, for the possibility of external connexion yet remains. That is the chief point of British interest in the new Constitution which received distinct if not excessive popular support at the referendum. It is true that the Constitution does make a vital derogation from the former position. Even in December 1936 Mr. de Valera insisted that his elimination from the Constitution of the Free State of all activity of the Crown in internal affairs nevertheless left the State a member of the British Commonwealth of Nations under Art. 1 of the Constitution of 1922.[1] That is gone, and all we have left is the decidedly inelegant phraseology of Art. 29, which provides that "for the purpose of the exercise of any executive function of the State in or in connexion with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern."[2] This is a very grudging admission, and the only law allowing for co-operation is the Executive Functions (External Relations) Act, 1936. Moreover, while that Act did not specifically authorize the performance by the Executive Council alone of every external act, the new measure allows the whole external power to be exercised by the Government. Thus the King might be ignored even for the most formal treaty. The Constitution[3] also allows any power to be conferred on the President, and there is now no difficulty from the constitutional point of view of Eire acting as a republic. The vital question whether the courts would accept the validity of the new Constitution is neatly handled. The judges must swear to uphold the Constitution and any judge who will not do so is deemed to have resigned.[4] In view of the plebiscite the judges are morally entitled now to disregard their oath to uphold the former Constitution, even if they did not agree with the Privy Council ruling in *Moore* v. *Att. Gen. for the Irish Free*

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[1] Cf. *Journ. Comp. Leg.*, Third Series, vol. xix, pt. i, pp. 106 ff.

[2] Art. 29 (4) (2).

[3] Art. 13 (10) and (11).

[4] Arts. 34 (5), 58 (6).

State,[1] as, of course, they are entitled to do. In other respects the Constitution does not immediately affect relations with Britain. The position of the British forces is not expressly mentioned. It is true that it is provided[2] that no armed force save that of the State shall be raised or maintained for any purpose whatever, but this is primarily aimed at the Irish Republican army rather than at the British armed forces. The position is delicate. Mr. de Valera is inexorable against the denial of full sovereignty involved in the British treaty rights, but he also demands control of Northern Ireland, on which no compromise is possible until the State satisfies the aspirations of the north. Efforts to do so are confined to the grant of absolute religious equality, rendered, however, less inviting by the recognition of the special position of the Roman Catholic Church ; the maintenance of the rule of proportional representation ; the possibility of recognizing the existence of a local legislature ; freedom of choice in education and no denominational preference. But frank acceptance of the British connexion is denied, and the assertion of the Constitution of the right to deal with the whole of Ireland,[3] though the exercise of the right is to remain in abeyance, is provocative.

The President of Eire.—This new office[4] supersedes that of Governor-General. The actual functions given are high, and important, but limited in scope unless enlarged by Parliament. The necessary independence of the ministry is given by popular election from candidates put forward by twenty members of the legislature or four county councils, a retiring or ex-president having the right to stand without other nomination. The term of office is seven years, subject to removal on impeachment instituted by a two-thirds' vote of either house and approved by a like vote in the other after examination by itself or by a body selected, at which the President may be represented. The President is no dictator ; he commands the forces and exercises the prerogative of mercy, but only on ministerial advice. He appoints the ministry, but the Prime Minister must be nominated by the Dail and the other members approved by it. His personal discretion, however, is absolute as regards the grant of a dissolution to a Prime Minister who has ceased to command the confidence of a majority of the Dail. Under the former Constitution no dissolution could be granted in such a case. If it is refused the Prime Minister must resign. He can also, after consulting the Council of State, described below, require either house of Parliament to meet, thus being able to compel a Prime Minister to face the Dail if he should appear inclined to act behind its back. No doubt, if a Prime Minister were defeated in the Dail and clung to office, he could dismiss him. But otherwise his normal position is that of acting on ministerial advice on all executive issues, and the Constitution requires that any new powers conferred shall be so exercised, negating any further grant of personal authority.

The President and Legislation.—The President's most important powers, not to be exercised on ministerial authority, are in connexion with legislation. In each case he must take the opinion of the Council of State but need not act on it. (1) If a dispute arises regarding the issue whether a Bill is a money Bill which the Senate has only twenty-one days to consider and no power to do more than make suggestions, the President decides whether the issue should be settled by a committee of privileges, composed of equal numbers of Dail and Senate with a judge with a casting vote only.[1] (2) Where a Bill is deemed to have been passed despite the Senate's dissent, he may on the application of a majority of the Senate and a third of the Dail decide that the measure is of such importance the people should decide. In that case he may not sign the Bill unless it is re-passed by the Dail after a dissolution within eighteen months or approved by referendum; in the latter case the Bill is approved unless a majority numbering not less than a third of the voters disapproves.[2] (3) He may refer a Bill of the constitutionality of whose provisions he is doubtful to the Supreme Court of not less than five judges, and if they report that any part is unconstitutional, he must refuse to sign.[3] (4) In the case of an urgent measure he may agree to the desire of the Dail to curtail the normal ninety days allowed for Senate consideration, but in that case the measure remains in force for no more than ninety days unless both houses agree to a further period. Such a Bill must be certified by the Prime Minister to be immediately necessary for the preservation of the public peace and security, or by reason of the existence of a public emergency, whether domestic or international.[4] It will be seen that all these powers are given to safeguard the people against any abuse of the power of the Dail. It may be added that in one case discretion might have been expected, namely in assent to a Bill to alter the Constitution,[5] but, though the President is to be satisfied that the necessary procedure has been carried out, he is to act as usual on the advice of the Government. On the other hand, for three years after he takes office, while the Constitution may be altered in any matters other than the Article prescribing the mode of change by simple Act, he may determine that a referendum must be held.[6] In view of the excessive freedom with which the former Constitution was altered, the new provision is desirable.

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[1] [1935] A.C. 484.

[2] Art. 15 (6).

[3] Arts. 2 and 3.

[4] Arts. 12 and 13.

The New Senate.—Mr. de Valera, who is not himself a supporter of two chambers, deferred to popular opinion and a new Senate is provided for in principle.[7] It will be elected after each Dail, whose maximum duration will now be seven as opposed to six years unless otherwise provided by law; the period so fixed will remain five years unless changed. It will number sixty members, of whom the Prime Minister will nominate eleven, the Universities elect six and the rest be elected from five panels representing national language and culture, literature, art, education and the professions; agriculture and fisheries; labour, organized and unorganized; industry and commerce; public administration and the social services, not more than eleven nor less than five being taken from any panel. The mode of election must be by proportional representation with the single transferable vote as for the Dail, but the rest is left to legislation. The Senate is given only the power to suggest amendments to money Bills within twenty-one days, and to delay other measures for ninety days, during which it can amend, but the Dail may pass the Bill over the head of the Senate thereafter. It may, of course, with the approval of the President obtain a referendum on important Bills. It is therefore practically in the position of the former Senate though even less powerful in the fact that its right to delay is less. It can help if it wishes to improve drafting, which is a gain. The Dail remains unchanged in principle, the essential power in the State.

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[1] Art. 20.

[2] Art. 27.

[3] Art. 26. This does not apply to a constitutional amendment, or a money Bill, or a Bill on which discussion is abridged under Art. 24.

[4] Art. 24.

[5] Arts. 46, 47.

[6] Art. 51.

[7] Arts. 18, 19.

The Rights of the Subject.—The precedent of 1922 has been followed and amplified, for a list of directive principles of social policy is given, but happily not for enforcement by the courts.[1] In the main, as in 1922, what is given with the one hand is taken away by the other, for simple legislation can invade the rights asserted. This is especially so as regards liberty. *Habeas corpus* is made available, but may not be invoked to prohibit, control or interfere with any act of the defence forces during a state of war or armed rebellion.[2] Further, special courts may be set up where the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, and military courts may deal with persons not subject to military law in time of war or rebellion.[3] Nor may anything in the Constitution be invoked to invalidate any law expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in pursuance of any such law.[4] Presumably, however, before such a law was passed the President might refer it to the Supreme Court and refuse assent if ruled unconstitutional. But, if he does not do so, such a law can override the Constitution. It seems a very dangerous enactment, and these infringements of liberty seem strange in a now orderly State. Another contentious provision is that[5] which imposes on the State the duty to endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. This is ominous, and the censorship of publications is an indication of the possibilities of its use to prevent legitimate expressions of dissent from current views.

Constitutional Change.—The use of the referendum for that purpose, after passage of a Bill through the legislature, is a welcome principle,[6] and a reversion to the original intention of the framers of the Constitution of 1922. All legislation inconsistent with the Constitution is made void to the extent of its repugnancy. Can this restriction be enforced, or will the legislature assert sovereign power? The judges are sworn to uphold the Constitution, but a simple Act without challenge could add to the courts judges sufficient to induce acceptance of any decision desired by the Parliament, and it is true that the new Constitution has been enacted by a legislature incompetent so to provide. What can be done once may be done again. Rigidity in a federal State is easy to maintain in comparison with such an attempt in a unitary State. On the other hand, there is advantage in seeking to secure some measure of stability, and the chief obvious criticism is that there are too many principles in the Constitution which might easily have been left to change by ordinary Act. Must one form of proportional representation be sacrosanct, or the right to automatic re-election of the Speaker or Chairman of the Dail, or the position of the Attorney-General, or a minimum of three members for each Dail constituency? Many of the declarations as to the family, education, religion, private property are far too vague to be made constitutional, and to forbid divorce and the recognition—in obscure circumstances—of the validity of divorces granted outside Eire might well have been left to ordinary law, together with the prohibition of conferring titles of nobility.[1]

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[1] Art. 45.

[2] Art. 40 (4) (3).

[3] Art. 38 (3) and (4). Special courts must be established by law.

[4] Art. 28 (3) (3).

[5] Art. 40 (6).

[6] Art. 46 (2).

The Immunity of Union Acts from Judicial Control.—In the Union the complete fluidity of the Constitution has been made clear by the decision of the Appellate Division in *Ndlwana* v. *Minister of the Interior*,[2] which has evoked considerable interest. The appellant there was a voter whose name was removed under Act No. 12 of 1936 from the ordinary voters' roll and placed on a native voters' roll. The point taken and persisted in was that the Act had not been duly passed, because it had been passed at a joint sitting of the two Houses of Parliament under s. 35 (1) of the South Africa Act, whereas it was not a measure which ought to be treated in that way. The Cape Provincial Division dismissed the case and the Appellate Division itself raised the question whether the court had any power to pronounce on the validity of an Act of Parliament duly promulgated, published and printed by proper authority inasmuch as Parliament was now under the Statute of Westminster supreme and in the Status of the Union Act had asserted its sovereignty. The court investigated the position of an Act duly printed on the assumption that it did correspond with the original. It rejected the suggestion that the Union was not sovereign, since the power had been conferred by Imperial Statute and might be revoked. "Freedom once conferred cannot be revoked." The other argument open was whether the procedure of the South Africa Act was not binding on the Parliament until altered by law. But the court held that it was a matter of internal economy, so long as the Crown, Senate and Assembly had all functioned, and that the validity of Acts therefore could not be impugned. This accords with the

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[1] Art. 40 (2). This would not exclude an Order of Merit as in Quebec.

[2] I am indebted for a copy of this judgment to Mr. C. W. A. Coulter, M.P.

English rule, and even in the Dominions there is little evidence of effective control by the courts over forms of passing Acts if duly signed and printed by authority.[1]

Union Legislation and the Native Territories.—The matter is of interest in regard to the dispute between General Hertzog and the Dominions Secretary [2] over the alleged British failure to carry out the understanding of 1935 regarding measures to facilitate acceptance by the natives of transfer to the Union. There can be no doubt that General Hertzog in this matter is in the wrong. There has been no breach of faith as alleged by the *Cape Times*. The *Argus*, also a supporter of fusion, frankly admits the truth. The former content of the natives in many parts of the Union has disappeared and anxiety and depression reign in view of the policy of the Union, interpreted as dominated by the feeling that the Union is determined to thwart the advance of the natives to a higher form of civilization. Hence in the Territories there is nothing but opposition to transfer which no effort on the part of British officials could affect. Everything has changed since transfer was considered in 1909 [3]; the Crown has lost power to disallow legislation, no security for the maintenance of the conditions then embodied in the schedule to the South Africa Act exists, the Union has abolished the former political equality of natives and Europeans in the Cape and has adopted a native policy based on placing a permanent barrier between native and European civilization. General Hertzog's proposal after passing resolutions under s. 151 of the South Africa Act to press the King to transfer is plainly unconstitutional. The power given is to the King in Council, and that power can be exercised only on the authority of the British Government. The Union, it may be noted,[4] in the Royal Executive Functions and Seals Act, 1934, assumed power to exercise through the Governor-General in Council any power of the King in Council; but, though no saving was made for s. 151 of the South Africa Act, on the issue being raised in Parliament, the Dominions Secretary asserted that the Union Government admitted that it could not use the power to transfer.

The Imperial Conference and British Nationality.—General Hertzog's rather marked hostility to the British Government may have been induced by the failure of the Imperial Conference [5] to accept his proposal of the amendment of the British Nationality and Status of Aliens Act, 1914, so as to confine the meaning of British subject to subjects of Great Britain. The aim of this policy was simple. The doctrine of the right of neutrality and secession recently expounded by Dr. Bodenstein suffers from the difficulty that the nationals of the Union are also British subjects both in the Union under General Hertzog's own British Nationality in the Union Act, 1926, and outside the Union under the Imperial Act. Even, therefore, if they were deprived of British nationality in the Union by Union Act, as in the case of the Irish Free State under the legislation of 1935,[1] they would remain British subjects elsewhere, and secession and neutrality would be incomplete without British recognition. Hence the amendments prepared by Dr. Bodenstein to the Imperial Act, but not homologated by the Conference. The scheme as presented took the form of stressing the convenience for purposes of immigration restriction, liability in respect of deportation, diplomatic protection and the application of treaties, etc., that each unit of the Commonwealth should define its own members. But the British Government refused to act, stressing the fact that the conditions of the Empire precluded the creation of anything which would correspond to the idea of a Dominion national as in Canada, the Union and the Free State. It further announced its determination to protect British subjects in all cases, the term meaning subjects of the King, to whatever part of the British Commonwealth they belong, wherever there is no Dominion legation or consulate available. It may be assumed that, where persons can claim as British subjects and Dominion nationals under treaty, the British Government would put forward the more advantageous case for the individual concerned. There are obvious difficulties possible, but plainly the British attitude of readiness to help is sound, and it was suggested that the Dominion representatives should act similarly. The idea, of course, is that it is an internal affair of the Empire what agency of the King puts forward a claim, as was held in the case of Canadian action for Britain in the case of the *I'm Alone* claim against the United States.

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[1] Keith, *Responsible Government in the Dominions* (1928), i, 354.

[2] Gen. Hertzog, *Argus*, July 6, 1937; Mr. MacDonald, House of Commons, July 9, 1937.

[3] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 66–78; *The King, the Constitution, the Empire and Foreign Affairs*, 1936-7, pp. 85-9

[4] See *Journ. Comp. Leg.*, Third Series, vol. xvi, pt. iv, pp. 292, 293.

[5] Parl. Pap. Cmd. 5482, pp. 23 ff.

Membership of a Commonwealth Unit.—Interesting principles were laid down as to legislative definition of those persons to be deemed members of any unit, or the attitude to be adopted in administration and legislation by units not desiring to set up local nationalities, *e.g.* New Zealand. Birth, naturalization in a territory or its annexation clearly give membership ; the only difficult issue is residence of those coming from other units having regard to the interest of the other units in their members, and to the wishes of these members and the nature of their residence. Consultation before new legislation is suggested, and the grant of optional exclusion if a legislature makes provision for nationality which may affect persons resident in the unit who immigrated before the new legislation. The difficulty of the system of local nationalities is clear when the question of competition between units is thus faced, and it is not surprising that there was indisposition to extend the system in cases where it has not yet established a firm hold. Canadian nationality is full of difficult points, and, still more obviously, that of the Irish Free State.

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[1] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 35 f., 51 ff.

Multilateral Treaties.—It is satisfactory that the principle of concluding treaties in the name of the King was once more approved, it being held that it was clear that when treaties were entered into in this form the several responsibility of each unit for its obligations was quite plain. This question of the responsibility of the units of the Commonwealth for the laches of other units presents theoretic difficulties in abundance,[1] but it can hardly be said to have practical importance for the present.

Imperial Defence.—The Conference saw a further insistence on the absolute autonomy of its units in the matter of defence. The hopes of the Commonwealth and New Zealand of some advance to a joint system were defeated by the resolute refusal of Canada to enter into any engagement. As Mr. Mackenzie King insisted on July 19 in broadcasting on the Conference, the Canadian Parliament must always decide as to participation in any war, though in France on July 2 he deprecated accusations that Canada was standing aloof from the Commonwealth and predicted that help would be given to Britain in difficulties. The Union attitude was still more negative, for Mr. Pirow did not attend the Conference, and on May 26 repeated at Kroonstad his chief's doctrine of neutrality, insisting that the relation between Simonstown and the Union on the one hand and Gibraltar and Spain on the other was the same.[2] The Dominion representatives, however, admitted the propriety of British rearmament, and Mr. Lyons, conscious of the steady decline of his government's position, urged the bringing about of a Pacific Pact which, of course, would relieve Australia of the increasing burden of her substantial rearmament programme. The impossibility of such a pact, without acceptance by Britain, the United States and China of the independence of Manchukuo and of Japanese rights in Hopei and Chahar, was at once stressed by Japan. Negative results, however, in foreign policy and defence were inevitable, and as regards trade the renewal and modification of the Ottawa agreements were left to be dealt with separately, and emigration was recognized to be impossible for the time being. The Conference is essentially an occasion for general discussion of imperial issues, a function stressed by Mr. Mackenzie King, not for decisions, and the most serious defect in it is that its educative value is minimal, owing to its being confined to members of governments. As no resolutions are decided upon save unanimously and in cases where divergence of view is impossible, it might be well to extend the membership by including opposition leaders. A change of government in Australia, for instance, renders the knowledge gained by ministers almost unimportant.

Canada and the Privy Council.—There is no doubt of the unpopularity in Canadian legal circles[3] of the decision of the Privy Council that the federal Parliament cannot legislate in matters assigned by the Constitution to the provinces by the process of ratification of labour conventions agreed to under the procedure of the treaties of peace.[1] It has been followed by a demand for the recasting of the Constitution, the abolition of the appeal and the abrogation of the binding force of the decisions hitherto given by the Judicial Committee. It is easy to understand how much anxiety is felt at the defeat of what seemed an ingenious mode of adapting the Constitution to modern needs. The Fathers of Confederation could not foresee modern conditions or realize that uniformity in hours of labour, the grant of a weekly rest period, or the provision of minimum wages might become matters requiring urgently to be regulated on a single basis for the Dominion, since otherwise provincial jealousies might easily result in beneficent reforms being impossible, since no province could progress in industrial conditions substantially in advance of its neighbours without risk of serious loss of business. Nor could they foresee that such matters might become of international concern, and that Canada ought to be able to play her part in world industrial affairs. But the only legitimate way to criticize the Committee is to look at the issue from a purely legal point of view. In this light the position is different. The arguments of critics are not wholly convincing. (1) It is urged that the generous mode of construction adopted in *Edwards* v. *Att.-Gen. for Canada*[2] should have been followed. Now in that case the Privy Council did undoubtedly strain law to what to many seemed the breaking point by ruling that the appointment of females as Senators was compatible with the British North America Act. Granting that, however, it must be remembered that the court was careful to point out[3] that the width of interpretation was confined to a clause not involving the vital sections, 91 and 92, which distribute legislative power. (2) It is urged that the new decision contradicts the attitude of the Council in the *Aeronautics*[4] and *Radio Cases*.[5] It is true from what the Chief Justice of Canada said that these decisions were widely interpreted in Canada and elsewhere as asserting the right of Canada by treaty arrangements to impinge on the provincial sphere. But they did not involve any such principle as a matter of law. Aerial navigation was plainly given to the federation by s. 132 of the British North America Act, 1867, as covered by a treaty between the Empire and foreign countries binding on Canada. Radio communication was not covered by a treaty of that type, framed in the name of the Empire, but was easily brought under the express grant to the federation of power to deal with telegraphs and other works and undertakings extending beyond the limits of any province.[6] Even radio communications merely within the province could easily be ruled to be so bound up with other communications as to be inseparable and therefore to fall within the federal sphere. It may be candidly admitted that the original decisions were unhappily worded, but that does not conclude the matter. (3) The essential question is whether there was any ground on which the fact that a treaty had been made could be held to have conferred on the federation legal power to invade the sphere of the provinces. The Supreme Court long ago, on the reference as to legislative jurisdiction as to hours of labour,[1] arising out of the question whether Canada could implement by federal legislation the Washington Convention of 1919, had ruled that the proper course was to bring the matter before the provinces as entitled to legislate on the question of hours of labour generally. That course has been reaffirmed by the Privy Council as the proper legal course, and the reasoning seems unanswerable. It must be admitted that, if treaty-making gives legislative power to override the provinces, the securities of Quebec for her religion, her language and education might be destroyed. True, any such action seems out of the question, but the argument is one certain deeply to impress Quebec.

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[1] Cf. A. Tammes, *De Rechtsbetrekkingen der Leden van het Britsche Gemeenebest, onderling en in het Volkenrecht* (1937).

[2] Keith, *Letters on Imperial Relations*, 1916–35, pp. 166, 167, 351.

[3] 15 Can. Bar R. No. 8.

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[1] [1937] A.C. 326.
[2] [1930] A.C. 124.
[3] [1930] A.C. at p. 137.
[4] [1932] A.C. 54.
[5] [1932] A.C. 304.
[6] B.N.A. Act, 1867, s. 92 (10).

The Natural Products Marketing Act.—That the Privy Council[2] should uphold the invalidity of a measure which clearly purported to cover transactions taking place solely in a province, as already ruled by the Supreme Court, was inevitable. A novel element, however, was introduced by the effort of British Columbia to secure from the Council a declaration that the Act was *ultra vires* only in so far as it conferred on the Dominion Marketing Board powers to deal with matters not necessarily ancillary to the main power, relying on the fact that s. 26 of the Act attempted to preserve so much as might not be *ultra vires* of the measure as distinct legislation within federal power. The Council negatived the request, partly because the issue had not been raised by British Columbia in the Supreme Court, and partly because both the Dominion and the province in their cases had asserted that the legislation in question was ancillary. They admitted that probably marketing schemes could be made effective only by federal and provincial action combined, but that could not be furthered by either encroaching on the sphere of the other. The attempt to support the legislation under the trade and commerce power thus being rejected, the effort to claim validity under the general residual power naturally failed, the Privy Council giving its full approval of the Chief Justice's judgment on this head, where he showed that only extraordinary circumstances, peril to the material life of Canada, epidemic of pestilence, etc., would justify invasion of the provincial sphere under this head.

Unemployment Insurance.—The Privy Council[3] seems to have had an unanswerable case in negativing the right of Canada to invade this field, even though the result may be that Canada can only make doles in lieu of working out a contributory scheme of insurance. The Chief Justice, however, had held that the matter could be arranged under the right of Canada to raise taxation, to deal with the proceeds as property and to apportion them to payments to insured persons.[4] The answer seems clear : " If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the province, or in respect of other classes of subjects otherwise encroaches on the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain."

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[1] [1925] S.C.R. 505.

[2] [1937] A.C. 377; [1936] S.C.R. 398.

[3] [1937] A.C. 355; [1936] S.C.R. 427.

[4] B.N.A. Act, 1867, s. 91 (1) and (3).

Bankruptcy and Farmers' Creditors Arrangements.—In this case [1] the appeal from the Supreme Court by British Columbia was hopeless from the first. The policy of relieving farmers by schemes of composition, which avoid actual bankruptcy but are based on the assumption of insolvency, is plainly well within the federal power to deal with bankruptcy and insolvency. The issue had already been decided in this sense in *Re Companies' Creditors Arrangement Act* by the Supreme Court.[2]

The Canadian National Trade Mark.—In one case the Privy Council [3] admitted the validity of sections of the Dominion Trade and Industry Commission Act, 1935, impugned by the Supreme Court. That measure provides for the mark C.S., which means that the article thereby designated complies with the requirements of a specification of a commodity standard under any Dominion Act, and it vests the property in the mark in the Crown, but allows its application by producers or merchants to any article which duly complies with a standard, and penalizes improper use. It was objected that this was to create a civil right, involving interference with the provincial control of property and civil rights. But the Committee pointed out that Canada could certainly legislate as to trade marks, an important declaration, and that, so long as it could rely on the trade and commerce power there was no reason why it should not create a new jurisdiction right. The vesting of the property in the mark in the Crown might be useful as a basis of proceedings in respect of infringements by persons in Canada not within the rather limited provisions of the penal clause or by persons abroad where Canadian penal laws would not take effect. The reasoning is persuasive, and may be contrasted with the refusal of the High Court of the Commonwealth to recognize the union label [4] device of similar character, but that decision might now be overruled, as it was arrived at under views as to the powers of the federation now definitely abandoned by the High Court.

The Amendment of the Constitution.—This issue has once more been busily discussed. The vital point remains whether the Imperial Parliament could be asked to make any change in the relative powers of the federation and the provinces unless the provincial legislatures as well as the federal Parliament desired the changes in question. For practical purposes as opposed to theory, it suffices to point to the fact that in 1935 the Minister of Justice in the government of Mr. Bennett committed himself to the view that their consent would be requisite, and that

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[1] [1937] A.C. 391 ; [1936] S.C.R. 384 (Cannon J. dissenting).

[2] [1934] S.C.R. 659.

[3] [1937] A.C. 405 ; [1936] S.C.R. 379.

[4] (1908) 6 C.L.R. 469.

Mr. Lapointe, now Liberal Minister of Justice, insisted that the Imperial Parliament could not without their consent interfere to affect the control over property and civil rights of the provincial legislatures.[1] Moreover, even after the shock caused by the decisions of the Privy Council, Mr. Lapointe would not commit himself to the possibility of overruling the provinces, and Mr. Mackenzie King only pleaded for agreement, evidently feeling that piecemeal amendment was the only probable line of approach.[2] The appeal could, of course, probably be abolished by concurrent action by federation and provinces, but if the necessary agreement could be obtained a request for Imperial legislation would be preferable as free from doubt. But where is unanimity to come from? And so long as any important province preserved the appeal, there could be no finality, even if the Supreme Court was made final for all issues which came to it. If this were done and the Supreme Court overruled decisions by the Committee, and it in turn in cases reaching it declared the Supreme Court at fault, there would be chaos in the legal system of the interpretation of the Constitution. That the appeal should be retained against the desire of Canada no one claims, but it is for Canada to express in due constitutional form that desire. The Imperial Parliament cannot with the slightest claim to constitutionality act *proprio motu*, and, so long as the Privy Council is compelled to act as the final court of appeal because Canadian litigants desire to obtain its views, it deserves rather sympathy than criticism for its valiant efforts to carry out an extremely difficult task.

The Disallowance of Albertan Acts.—Another side of the Canadian Constitution is revealed in the necessity which has arisen of disallowing (August 17) three Albertan Acts. It has long been the policy of the federation not to use this power, but to leave measures attacked as unjust to stand and those arraigned as unconstitutional to be dealt with by the courts. Nor in this case would disallowance have been resorted to, had not the Albertan Government declined to suspend operation of the measures pending reference to the Supreme Court as to their validity. In these circumstances Mr. Lapointe had no option but to advise disallowance, when he was satisfied that the operation of the measures pending the outcome of the reference would be mischievous. The grounds for this belief are simple enough. Alberta is seeking to operate a system of social credit under the disadvantage that the federation has exclusive power to legislate for banking, incorporation of banks and the issue of paper money, currency and coinage, interest and legal tender. The Acts attacked were intended to place under provincial control banks operating in Alberta by means of a licensing system, to require them to adopt a credit system dictated by the Social Credit Board and to deny resort to the courts on the issue of the legality of provincial Acts without the authority of the executive. The claim was made that these matters fell within the sphere of property and civil rights, which are provincial topics, but Mr. Lapointe's answer is conclusive. The express powers of the federation authorize invasion of what would otherwise be the provincial sphere. Unhappily there is no probability of Albertan acquiescence in the action of the federation, which on legal grounds seems beyond question. Alberta, it may be added, has already provided[1] immunity from action for official acts for executive councillors without the permission of the Lieutenant-Governor in Council, a rather startling inroad upon the rule of law, but that measure may be deemed to fall within its legislative sphere. If a serious conflict with the federation develops, the Lieutenant-Governor will be placed in a position analogous to that of Sir P. Game in the New South Wales contest with the Commonwealth ministry in 1932. On October 5 the Lieutenant-Governor announced his decision to withhold consent to Bills to control the press and banks and to tax the latter, pending instructions from the Dominion Government.

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[1] January 28, 1935; *J.P.E.*, xvi, 288, 289.

[2] January 26, 1937; *ibid.*, xviii, 337 ff.

[1] 1 Edw. VIII, Sess. 2, c. 16.

NOTES.

The Modern Law Review.—The number of English law reviews as distinguished from journals issued primarily for the use of practitioners is small, remarkably so if viewed in comparison with like publications on the Continent. There are reasons for this, some of them not discreditable to the character of English legal thinking. But that there is room for a review with the aims of the *Modern Law Review* which commenced publication last June, will, it is to be hoped, be proved by its success. Professor Chorley and Professor Keeton and their colleagues will render a great service if they establish as a permanent part of our legal literature a review which " deals with the law as it functions in society and primarily with English law in its relation to contemporary English conditions and problems." The first number is an earnest of success. The effort will have the good wishes and, it may be trusted, the support of all who realize how much law can hinder and how much law can promote happier social conditions.

A Problem of Nationality.—A nice point of construction may arise out of the wording of subs. 2 of s. 10 of the British Nationality and Status of Aliens Act, 1914, as amended in 1933, read with Art. 8 of the French Nationality Law of August 10, 1927.

Before the 1933 amendment a British woman lost her British nationality by marrying an alien. It might happen, however, that under her husband's national law her marriage to him had not conferred upon her his nationality. Former British subjects might thus find themselves Stateless (*heimatlos*). To obviate this hardship, the above-mentioned subsection was amended in 1933 and now runs as follows:

> Where a woman has (whether before or after the commencement of this Act) married an alien, and was at the time of her marriage a British subject, she shall not, by reason only of her marriage, be deemed to have ceased to be a British subject unless, by reason of her marriage, she acquired the nationality of her husband.

Marriage to an alien, therefore, does not necessarily affect the wife's previous British status, and it should be observed that the 1933 amendment is retrospective in effect. No British woman can become Stateless by reason only of her marriage, but it may be difficult in certain cases to ascertain her exact nationality. The problem is no longer that of absence of nationality, but rather that of doubtful nationality.

Paragraph 1 of Art. 8 of the French Nationality Law of August 10, 1927, provides that an alien woman who marries a Frenchman does not acquire the status of a Frenchwoman except at her express request or if, in accordance with the provisions of her national law, *she necessarily follows her husband's status*. In the adverb "necessarily" lies the crux of the matter.

A short account of the French procedure on such a mixed marriage will help to make the point clear. A decree of August 10, 1927, provides that the intended bride shall lodge with the civil status officer, whose functions correspond to those of the registrar of marriages in England, a certificate of law[1] setting out the effect of such a marriage upon her national status under her national law. If under that law she does not *necessarily* acquire her husband's nationality, and yet desires to become a Frenchwoman on her marriage, she has to make a written declaration to that effect to the civil status officer prior to the solemnization of the marriage. When the marriage takes place abroad, the declaration is made to a French diplomatic or consular officer.

If the declaration has been made, no difficulty can be experienced. Under Art. 8 of the French Nationality Law, the bride acquires French nationality, and as a necessary consequence loses her British nationality under the corresponding English Act. Where, however, the declaration has not been made, the bride's national status may be matter for controversy. Prior to, and apart from, the 1933 English amendment, she would have lost her British nationality by the mere fact of her marriage to an alien. It would appear, therefore, that even in the absence of the written declaration contemplated by French law, she acquired French nationality in such a case. It should nevertheless be observed that the French provision is curiously worded. It runs: "or if, in accordance with the provisions of her national law, she necessarily follows her husband's status," which seems to go a step farther than the English law before the 1933 amendment, under which British nationality was lost in such circumstances, whether or not a new nationality was acquired by reason of the marriage.

Since the 1933 amendment the position is more obscure. The British woman who marries a foreigner no longer loses her British nationality as a matter of course. If she has made no declaration claiming French nationality, can it be said that under English law "she necessarily follows the status of her husband"? The writer is not aware that the question has ever come up for an authoritative decision. Presumably, the British woman in such a case would retain her British nationality. In support of this view one may urge that the English subsection, as amended in 1933, appears to contemplate that retention of British nationality should be the rule. (A British woman "shall not, by reason only of her marriage, be deemed to have ceased to be a British subject *unless* . . .) Moreover, as it was open to her to acquire French nationality by a declaration, it is only fair in the absence of this to presume that she intended remaining British, and as she no longer ceases to be British as a matter of course on her marriage to an alien, why should she be considered to have necessarily followed her alien husband's status?

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[1] Which in the case of British subjects may be issued by a British consular officer.

As regards mixed marriages contracted before the 1933 amendment, the situation is not free from paradoxes. The amended subsection is retrospective in effect. Accordingly, it might be argued that British women married prior to the amendment (without having made the declaration claiming French nationality), and until then considered French inasmuch as (prior to the amendment) they automatically lost their British nationality by marrying an alien, have in fact retained their British nationality. The practical consequences may be important, *e.g.* if the married woman has remained British, she is free from the trammels upon the power of disposition by gift or will which exist in French law and are known as the "réserve."[1] If, on the other hand, she has become French, her power of disposition is limited. In the absence of the 1933 amendment, she would not have been considered a British subject after marrying an alien. The amendment, however, is retrospective in effect. What would be the position, for instance, if she died prior to the amendment?

It would be a mistake to assume that the problem is merely one of academic interest. It affords in any case another instance of the difficulty of legislating with the commendable object of eliminating conflicts of laws without, to use the homely saying, "falling out of the frying-pan into the fire."

M. F. P. HERCHENRODER.

Preparatory Acts in Criminal Law.—In certain recent international conventions dealing with matters of criminal law the parties have undertaken to punish or punish severely "preparatory acts" to the particular offences with which the conventions are concerned. The term is used in the Geneva Convention of 1921 for the Suppression of the Traffic in Women and Children, in the Geneva Convention of 1933 for the Suppression of the Traffic in Women of Full Age, in the Geneva Convention of 1929 for the Suppression of Counterfeiting Currency and in the Geneva Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs. As Great Britain is a party to, or signatory of, each of these conventions a note on the meaning of preparatory acts, particularly in Continental penal law, may be of some interest.

A preparatory act as understood in Continental law denotes that kind of action preparatory to the commission of the offence proper which is of so ambiguous a character that it cannot be regarded as an attempt to commit the offence or, to use the technical term employed in French law, as a *commencement of execution*. This stage of commencement of execution marks the transformation of the act from one of *equivocal* to one of *univocal* character, *i.e.* there is no doubt that if in the ordinary course of things the particular activity had been proceeded with the offence would have been committed. Thus the purchase of poison is by itself a preparatory act; it is ambiguous in nature; it is not clear from the act itself whether the purpose is felonious or whether the logical culmination would have been the commission of homicide by poison. On the other hand, the dropping of poison into a cup normally used by a particular person is a real commencement of execution; the nature of the act is univocal and in the ordinary course of things would lead to the completion of the offence by the victim involuntarily taking the poison.

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[1] In favour of descendants and ascendants.

In French penal law a great deal of discussion is to be found in the doctrine and in jurisprudence as to the meaning of preparatory acts, an attitude which contrasts strangely with the textbooks and judgments concerned with English criminal law, where indeed little or nothing on the matter is to be found.[1] The contrast is strange, since both English and French penal law adopt the same principle that in general preparatory acts are not punishable. The community has only an interest in the repression of such acts as by their nature are or may ordinarily be dangerous to its members. One is tempted to explain the contrast between English and French law by the reputedly more scientific and theoretical character of the latter. Although this explanation would be appropriate for the doctrine it would not apply to jurisprudence or case law. In the case of jurisprudence the explanation is that the question of whether an act is a commencement of execution and therefore an attempt is one of law, and courts of first instance, knowing that the matter may eventually come before the Cour de Cassation, invariably characterize the act in question as a preparatory act or as an attempt in order that the issue should be clearly defined for the higher tribunal. English courts, on the other hand, concentrate on the immediate and practical question—is the act punishable? What qualities has it that may constitute it an attempt? The negative question, what qualities has the act which may put it in the category of preparatory acts? is invariably left unanswered.

Preparatory acts are as a rule only punishable when designated as specific offences. Good illustrations are the possession of burglars' tools, the possession without licence of raw opium and dangerous drugs, etc. Indeed, the international conventions referred to above qualify the obligation on States to punish preparatory acts to certain offences, by such words as "subject to the conditions prescribed by national law" and the like. It is not easy to say how far, in pursuance of such obligation, English criminal law would extend to the punishment of preparatory acts. In this connexion attention may be drawn to the important but little-known s. 13 (1) (d) of the Dangerous Drugs Act, 1920, which reads:

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[1] Judgments in certain Indian jurisdictions have, however, dealt with the subject of preparatory acts.

> Any person . . . who in Great Britain aids, abets, counsels or procures the commission in any place outside Great Britain of any offence punishable under the provisions of any corresponding law in force in that place, or does *any act preparatory to, or in furtherance of*, any act which if committed in Great Britain would constitute an offence against this Act, shall be guilty of an offence against this Act.

The courts may experience certain difficulty in interpreting and applying this provision.

J. G. STARKE.

The Ratification of International Labour Conventions: the Present Situation.—The registration of the 750th ratification of an international labour convention, which took place on July 9, 1937, is an indication of the substantial progress which has now been achieved by the International Labour Organization in building up common world standards of labour legislation. The 750 ratifications have been registered on behalf of no fewer than 45 States and are distributed as follows among 48 of the 62 conventions which have been adopted by the International Labour Conference in the course of its first 23 sessions: Hours of Work (Industry) Convention, 1919, 22; Unemployment Convention, 1919, 30; Childbirth Convention, 1919, 16; Night Work (Women) Convention, 1919, 30; Minimum Age (Industry) Convention, 1919, 27; Night Work (Young Persons) Convention, 1919, 31; Minimum Age (Sea) Convention, 1920, 32; Unemployment Indemnity (Shipwreck) Convention, 1920, 26; Placing of Seamen Convention, 1920, 24; Minimum Age (Agriculture) Convention, 1921, 20; Right of Association (Agriculture) Convention, 1921, 30; Workmen's Compensation (Agriculture) Convention, 1921, 21; White Lead (Painting) Convention, 1921, 24; Weekly Rest (Industry) Convention, 1921, 28; Minimum Age (Trimmers and Stokers) Convention, 1921, 32; Medical Examination of Young Persons (Sea) Convention, 1921, 31; Workmen's Compensation (Accidents) Convention, 1925, 17; Workmen's Compensation (Occupational Diseases) Convention, 1925, 28; Equality of Treatment (Accident Compensation) Convention, 1925, 35; Night Work (Bakeries) Convention, 1925, 11; Inspection of Emigrants Convention, 1926, 19; Seamen's Articles of Agreement Convention, 1926, 21; Repatriation of Seamen Convention, 1926, 17; Sickness Insurance (Industry, etc.) Convention, 1927, 16; Sickness Insurance (Agriculture) Convention, 1927, 11; Minimum Wage-fixing Machinery Convention, 1928, 20; Marking of Weight (Packages Transported by Vessels) Convention, 1929, 33; Protection against Accidents (Dockers) Convention, 1929, 4; Forced Labour Convention, 1930, 18; Hours of Work (Commerce and Offices) Convention, 1930, 9; Hours of Work (Coal Mines) Convention, 1931, 1; Protection against Accidents (Dockers) Convention (Revised), 1932, 7; Minimum Age (Non-Industrial Employment) Convention, 1932, 6; Fee-charging Employment Agencies Convention, 1933, 4; Old-age Insurance (Industry, etc.) Convention, 1933, 2; Old-age Insurance (Agriculture) Convention, 1933, 2; Invalidity Insurance (Industry, etc.) Convention, 1933, 2; Invalidity Insurance (Agriculture) Convention, 1933, 2; Survivor's Insurance (Industry, etc.) Convention, 1933, 1; Survivor's Insurance (Agriculture) Convention, 1933, 1; Night Work (Women) Convention (Revised), 1934, 10; Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934, 10; Sheet-glass Works Convention, 1934, 2; Unemployment Provision Convention, 1934, 2; Underground Work (Women) Convention, 1935, 11; Hours of Work (Coal Mines) Convention (Revised), 1935, 1; Maintenance of Migrants' Pension Rights Convention, 1935, 1; Reduction of Hours of Work (Glass-bottle Works) Convention, 1935, 2.

The conventions not included in the above list are all of recent date, and some time will naturally be required for their consideration in the various countries before they can be expected to receive ratifications. The relatively small number of ratifications received by the more recent conventions in the above list is also, in most cases, explicable by the usual time-lag.

Great Britain is at present a party to the following 28 conventions: Unemployment Convention, 1919; Minimum Age (Industry) Convention, 1919; Night Work (Young Persons) Convention, 1919; Minimum Age (Sea) Convention, 1920; Unemployment Indemnity (Shipwreck) Convention, 1920; Right of Association (Agriculture) Convention, 1921; Workmen's Compensation (Agriculture) Convention, 1921; Minimum Age (Trimmers and Stokers) Convention, 1921; Medical Examination of Young Persons (Sea) Convention, 1921; Equality of Treatment (Accident Compensation) Convention, 1925; Inspection of Emigrants Convention, 1926; Seamen's Articles of Agreement Convention, 1926; Sickness Insurance (Industry, etc.) Convention, 1927; Sickness Insurance (Agriculture) Convention, 1927; Minimum Wage-fixing Machinery Convention, 1928; Forced Labour Convention, 1930; Protection against Accidents (Dockers) Convention (Revised), 1932; Old-age Insurance (Industry, etc.) Convention, 1933; Old-age Insurance (Agriculture) Convention, 1933; Invalidity Insurance (Industry, etc.) Convention, 1933; Invalidity Insurance (Agriculture) Convention, 1933; Survivors' Insurance (Industry, etc.) Convention, 1933; Survivors' Insurance (Agriculture) Convention, 1933; Night Work (Women) Convention (Revised), 1934; Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934; Sheet-glass Works Convention, 1934; Unemployment Provision Convention, 1934; Underground Work (Women) Convention, 1935.

Great Britain has also been a party to the Night Work (Women) Convention, 1919, and to the Workmen's Compensation (Occupational Diseases) Convention, 1925, but denounced these Conventions on ratification of the Conventions revising them.

Great Britain has not yet become a party to the following Conventions: Hours of Work (Industry) Convention, 1919; Childbirth Convention, 1919; Placing of Seamen Convention, 1920; Minimum Age (Agriculture) Convention, 1921; White Lead (Painting) Convention, 1921; Weekly Rest (Industry) Convention, 1921; Workmen's Compensation (Accidents) Convention, 1925; Night Work (Bakeries) Convention, 1925; Repatriation of Seamen Convention, 1926; Marking of Weight (Packages Transported by Vessels) Convention, 1929; Hours of Work (Commerce and Offices) Convention, 1930; Minimum Age (Non-Industrial Employment) Convention, 1932; Fee-charging Employment Agencies Convention, 1933; Hours of Work (Coal Mines) Convention (Revised), 1935; Forty-Hour Week Convention, 1935; Maintenance of Migrants Pension Rights Convention, 1935; Reduction of Hours of Work (Glass-bottle Works) Convention, 1935; Recruiting of Indigenous Workers Convention, 1936; Reduction of Hours of Work (Public Works) Convention, 1936; Holidays with Pay Convention, 1936; Officers' Competency Certificates Convention, 1936; Holidays with Pay (Sea) Convention, 1936; Shipowners' Liability (Sick and Injured Seamen) Convention, 1936; Sickness Insurance (Sea) Convention, 1936; Hours of Work and Manning (Sea) Convention, 1936; Minimum Age (Sea) Convention (Revised), 1936; Minimum Age (Industry) Convention (Revised), 1937; Minimum Age (Non-Industrial Employment) Convention (Revised), 1937; Reduction of Hours of Work (Textiles) Convention, 1937; Safety Provisions (Building) Convention, 1937.

C. W. JENKS.

The Hindu Women's Rights to Property Act, 1937—known also after the distinguished surgeon who sponsored it in the legislature as Doctor Deshmukh's Act—became law on April 14, 1937: and its draftsmanship has been subject since then to a stream of criticism. As Hindu law stood before the Act was passed, a Hindu widow was excluded from the inheritance of her husband's property by his sons, sons' sons, and sons' sons' sons; nor did she, even if he left no descendants, take any proprietary interest in a Mitakshara coparcenary of which he was a member. The widows of his sons and sons' sons who predeceased him had no rights beyond maintenance, and in a Dayabhaga family they had no legal right even to that. The hardship of this state of affairs had been brought more prominently into notice as regards the joint family (at any rate in Bombay, from which Presidency Doctor Deshmukh comes) by the Privy Council decision in *Bhimabai* v. *Gurunathgowda*,[1] since it is possible for a widow having no proprietary interest to introduce a total stranger into the coparcenary body against the wishes of its members in the guise of her own and her husband's adopted son.

The Act was obviously intended to remedy this state of affairs, and the first and most obvious defect in it is that the son's widow and son's son's widow do not benefit by it unless the *propositus* himself left a widow him surviving, a ground of discrimination which is obviously unreasonable and cannot have been intended. Criticism has also been directed against the wording that property shall devolve upon his widow "along with his lineal descendants," and it has been suggested that the effect of this clause is to introduce into the first place in the order of succession a number of relatives who previously did not inherit at all or at best were postponed to a later place in the scheme of inheritance, for instance the daughter, the son's daughter and the daughter's daughter. This criticism is backed by eminent names, and the wording is, at best, clumsy. One distinguished writer, however, Mr. J. R. Gharpure, in the *Bombay Law Journal*,[1] has pointed out that the expression "lineal descendants" in English law does not include all descendants of the body: and probably the courts would have little difficulty in holding that the expression "along with" was not a mandatory provision introducing a large new class of heirs, but merely provided that the widow shall inherit along with such lineal descendants as previously were preferred before her. That is the obvious intention.

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[1] (1933) 60 I.A. 25.

A more serious flaw, and one which has so far escaped notice in India, is that the Act only contemplates a Hindu leaving one widow. What is to happen when he leaves two or more? Two difficulties arise: (i) as regards the property which passes by inheritance, (ii) as regards his interest in the Mitakshara coparcenary. For the first, property, we are told, shall devolve upon his widow "in like manner as it devolves upon a son." Do two or more widows each take a son's share, or only one son's share between them? For the latter, quite clearly the widows cannot take any greater interest than their husband himself had, and they must somehow share that interest. But "a widow shall have the same right of claiming partition as a male owner." Can one of two or more widows enforce an absolute partition contrary to the wishes of her co-widows? and whether in ancestral or self-acquired property are the rights of co-widows an indivisible joint tenancy, as under the old law in the case where widows inherited or held by separate titles as the Act would appear to imply?

To the sociologist the fact that the Act got through the legislature and has run the gauntlet of the critics for months without this flaw being noticed is perhaps even more interesting than it is to the lawyer: and he would be justified in pointing to it as illustration of the fact that the vast majority of Hindus think in terms of monogamy even though their law permits polygamy. Polygamy, though legally easier, is in fact as uncommon among them as divorce among ourselves.

S. V. FG.

Conflict of Jurisdiction in Palestine.—The case of *Ishhadeh* v. *Fareedeh*, decided by the Palestine Supreme Court sitting as a Court of Appeal on May 24, 1937, and reported in the *Palestine Post* of June 3 last, is bound to give rise to much discussion. The point actually decided is in form merely that certain legislation of the Palestine Government is *ultra vires* as contravening the terms of the Order in Council, 1922, from which that Government derives its legal existence. But behind this technical question lurk two others of a more dangerous character, namely whether the rights of the followers of one religion can safely be left to the determination of purely religious courts of another religion, and whether courts which derive their authority from the Crown can be permitted deliberately[1] to ignore its enactments.

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[1] Vol. xv, p. 98.

Courts which derive their authority from the Crown—let there be no mistake about this. In the eye of English law the Moslem religious courts derive their authority from the Crown no less than the civil courts: their jurisdiction is to be found in the Order in Council and not in Turkish precedents. But it is an established principle of Moslem law also that a Qadi cannot function unless he derives his authority from an effective ruling power, and that even a tyrannical power or a non-Moslem power which respects Islam is a sufficient authority.

The law to be considered was, first, the Moslem rule, by which difference of religion is a bar to inheritance; and secondly, the following provisions of enacted law:

Succession Ordinance (*Ordinances Cap.* 135), s. 24, clause 1: No person shall be deemed to be under a legal incapacity to take any share in a succession to property in Palestine or to take under a will by reason only of his nationality or religious belief.

This provision, of course, abrogates *inter alia* the Moslem rule just cited. Its legality was not doubted by the Supreme Court, and it is the clear duty of all courts in Palestine, including Moslem religious courts, to give effect to it, a duty which the Qadi's court in this case did not perform.

Ibid., clause 2—(this clause was the crux of the dispute.)

When *under the law then applicable*[2] in Palestine, any person *has been*[2] excluded from a share in the succession to a person who *has died*[2] possessed of property in Palestine since the 31st December, 1918, by reason only of his nationality or religious belief, the person so excluded or his heirs may apply to the district court, which upon such application and upon consideration of all the circumstances may make such order as it thinks fit reopening the succession and granting to the applicant such share in the succession as may, in the circumstances, appear equitable.

(Here follow two provisos.)

Other legislation considered in the case included the following:

Ibid., s. 6 (1): The Moslem Religious Courts shall have exclusive jurisdiction as to all matters relating to the succession upon death to the estate of a Moslem, whether under a will or otherwise.

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[1] Whether the Qadi *in this particular case* ignored deliberately or by *bona fide* mistake is beside the point, though it is hardly possible to doubt that the enactment in question was brought to his notice.

[2] The italics are mine.—[S. V. FG.]

Palestine Order in Council, 1923, Art. 52: "Moslem Religious Courts shall have exclusive jurisdiction in matters of personal status of Moslems . . .

Ibid., Art. 51. . . . For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce . . . succession wills and legacies. . . .

Now for the facts. A Moslem died leaving among other heirs a Christian wife to whom he had been married by Lutheran rites some nineteen years before. Application was made to the *Shari'a* court to adjudicate upon the succession. While the case was pending in that court the Christian widow made application to the district court under Succession Ordinance, s. 24 (2), an application which in any reading of the section was apparently premature since the *Shari'a* court had given no decision. Soon after, however, it decided according to the pure religious law excluding her from inheritance, contrary to Succession Ordinance, s. 24 (1); and the district court thereupon held that it had jurisdiction to reopen the case under the second subsection *ibid.* and to do justice between the parties.

With all due submission, it is by no means clear that this is the intention of the subsection. According to the usual canons of English syntax and statutory interpretation, it may well have been intended merely as a temporary provision affecting judgments delivered during the period between December 31, 1918, and the passing of the Succession Ordinance in April 1923. Be that as it may, the Supreme Court, accepting without argument the district court's view of the meaning of the subsection, held that it was *ultra vires* the local legislature as contravening the provisions of the Order in Council. Whether this decision is entirely correct or not, the Supreme Court has done well in calling attention to a very anomalous situation.

Art. 52 of the Order in Council gives to Moslem religious courts exclusive jurisdiction over Moslems only in matters of personal status, and the term "matters of personal status" includes succession at death. But we may fairly ask, "Whose personal status?" Of course the normal rule is that jurisdiction over a succession is determined by the personal law of the *de cujus*. But it is surely open to question how far the rule *haereditas sustinet personam defuncti* can be carried in this connection; and if we are to interpret the words "personal status" in the Order in Council as referring to the personal status of the interested parties, a not unreasonable interpretation, there is no more reason why the distribution of the estate should come before the Moslem court than before the Christian court.[1] Neither expressly nor by implication are the Moslem religious courts given jurisdiction to decide upon the rights of non-Moslems: yet that is what the Moslem religious court has done in this case. The learned judges of the Supreme Court, be it said with all due respect, seem to have read into the Order in Council the provisions of

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[1] In this case, since the wife did not belong to a community having a court of its own, the district court as representing the ordinary law of the land.

s. 6 (1) of the Succession Ordinance. That the two must be read together is, of course, quite clear: but if the only contradiction is merely between two sections of the same Ordinance issued by the same legislative authority, there can be no question of *ultra vires* and the two sections must somehow be reconciled. Indeed, the doctrine of *ultra vires* might hardly less effectively be cited on the other side. It might perhaps be argued that the Order in Council only gives Moslem courts jurisdiction over Moslems, and that the Ordinance so far as it purported to extend that jurisdiction was *ultra vires*.

The anomaly becomes even more glaring when we turn from questions of succession to other matters of personal status—for instance, marriage. Does the Supreme Court mean to hold that s. 4 (ii) of the Change of Religious Community Ordinance, 1927, is *ultra vires*? That would seem to be the inevitable result of their decision. But whether they mean to hold this or not, it would also seem to be clear on the basis of this decision that no court can have any jurisdiction over a mixed marriage one of the parties to which is a Moslem. The Moslem spouse is not amenable to any jurisdiction save that of the Moslem religious court: that Court can only have such jurisdiction as is granted to it, and it has nowhere been granted any jurisdiction over non-Moslems. Mere submission cannot vest a court with a non-existent jurisdiction. Therefore in whatever court a suit is brought there will be one party who is not subject and cannot be made subject to the jurisdiction of that court. Nor is it a satisfactory answer to this dilemma to say that the court of the defendant must decide the matter, for a decree to be of any value at all must be binding both on plaintiff and defendant and must be sufficient to prevent the question ever being disputed again in another court of co-ordinate jurisdiction. Similarly, unless a court has some *scintilla* of jurisdiction over a litigant, it cannot even order that litigant to pay costs.

Finally, it is somewhat difficult to appreciate the ground on which the Supreme Court held that the difficulty could not be solved by Art. 57 of the Order in Council. That article provides (subject to one condition, which does not concern the present case) that "the constitution and jurisdiction of religious courts . . . may be varied by Ordinance or order of the High Commissioner." The court held that "any Ordinance or Order which purports to vary the Order in Council must do so specifically and not merely by implication." For this proposition, no authority was given, nor have we been able to find any.

Palestine has a great variety of religious courts, and stands alone among territories under British rule or British protection in that the Supreme Court has no control whatever, by appeal, revision or inspection, over religious courts, or over the law which they administer. Whether an appeal by special leave may lie from them to the Privy Council is an obscure and difficult question, and from the point of view of such litigants as the widow in the present case it is not a practical question. True, the statute law governing the constitution of the Judicial

Committee makes no provision for such an appeal, and it might be argued that it impliedly excluded it. But there is considerable authority for the proposition that the right of His Majesty to entertain appeals from all his courts overseas is derived from his prerogative and can only be barred by express legislation. A Chief Execution Officer may refuse to execute a decree which is on the face of it *ultra vires*, and a Land Registry cannot be ordered to register a title to land by any other authority than a land court (or the Supreme Court in appeal from a Land Court). But a Chief Execution Officer (who is himself the president of the District Court) may find himself in the distasteful position of being obliged to execute decrees of whose legality and justice he can hardly fail to be doubtful.[1] One cannot but sympathize with the scrupulous regard for religious neutrality which prompted this state of affairs, and in the present exacerbated state of religious feeling it might be dangerous to attempt any reform. But it is sad to think that justice may have to wait on political expediency: and there are countries where Moslem plaintiffs, having a choice between a civil and a religious court for the administration of *Shari'a* law, normally choose the former.

S. V. FG.

Working Tools.—In spite of the numerous books of reference published in recent years, *The Annual Register*[2] still maintains the position which it has held for nearly two hundred years as the most convenient source of information for the public events at home and abroad. The summary of Parliamentary proceedings provides particulars of the circumstances which lead to the introduction of legislative measures and so enables a better appreciation to be obtained of their importance. The foreign section is supplemented by an appendix containing the full text of documents. In 1936 the three chosen were the new Soviet Constitution, The Treaty of Alliance between Great Britain and Egypt and the Guarantees given by Great Britain to France and Belgium. Similarly, the *Annual Survey of English Law*[3] contains a valuable section providing particulars of the Acts and Orders in Council giving effect to International Agreements and the International Conventions, Treaties and Agreements concluded by Great Britain. The main purpose of the book, which each year is accomplished with increasing skill and ability by the staff of the Departments of Law and International Studies of the London School of Economics, is to provide a summary of the legislation, case law and literature in the various branches of English law. The feature of the year 1936 was the number of consolidating Acts, especially in the sphere of local government, where much has been done in the last decade. Education and highway law, however, are still in need of attention.

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[1] The independence of Moslem religious courts is greater than that of the courts of the non-Moslem religious communities. Nevertheless the statements in this paragraph are true of the latter also.

[2] London: Longmans, Green & Co., 30*s*.

[3] London: Sweet & Maxwell, Ltd., 10*s*. 6*d*.

Among other measures the Declaration of Abdication Act calls for special mention and provides an example of the way in which the particulars, adequate for this volume, can be supplemented from the *Annual Register*. An important constitutional problem, " though less important in retrospect than it appeared to be at the time of the decision," received attention in *James* v. *Commonwealth of Australia*,[1] of which the summary might have given some particulars of the Dried Fruits Acts, 1928–35, so as to show the effect of the decision of its invalidity. Among English cases *Marshall* v. *Lindsey County Council*,[2] which has caused a good deal of perturbation among hospital authorities, is criticized by each of the commentators in the three sections in which it receives attention from different points of view. Its interest throughout the Dominions stimulates the hope that it may be possible to annotate decisions of the highest tribunal with some reference to similar decisions in their courts.

Much might be done to secure greater uniformity in law throughout the Empire by the adoption of the same meaning for words in the legislative enactments. An admirable aid to this end is provided by the *Index to Statutory Definitions*[3] prepared in the office of the Parliamentary Counsel. It is a laborious piece of work obviously compiled by men familiar with their work, and assistance has been provided for those less well informed by adding to the number of cross-references. It is well known that work of this kind does not receive much financial encouragement from the Treasury, but the utility of this publication is so obvious that it deserves more generous treatment so that the scale might be enlarged to the advantage of everyone, including, it may be, the Stationery Office as publishers. Cross-references are needed on a more generous scale. Few people think of a clergyman as an " officiating clergyman," so that the latter is the word under which he would be sought rather than the former, and although a reply postcard was a familiar article one would expect to find it under " postcard." Other examples might be cited and suggest that the index might be revised by someone with less technical knowledge than the compilers. It is too much to hope perhaps at present for the publication of an index containing the actual definitions, though the establishment of Lord Atkin's Institute of Legal Research might bring this and other desirable undertakings nearer to fruition.

C. E. A. B.

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[1] [1936] A.C. 578.

[2] [1936] 52 T.L.R. 661.

[3] London: H.M. Stationery Office. 10*s*. 6*d*.

NOTICES OF BOOKS.

COMMERCIAL ARBITRATIONS.[1]

THE majority, indeed the vast majority, of disputes arising in the mercantile community in England are settled by arbitration proceedings, and this has probably always been the case—for the early piepowder courts were virtually arbitral tribunals. In the post-war period there have been an unusual number of grievances against the law and its administration on the part of business men.[2] This has accentuated the tendency to prefer the arbitral to the judicial court. For some years past indeed there have seldom been as many as thirty cases awaiting trial in the commercial court at the beginning of term. No doubt the drying up of overseas commerce under a world-wide system of economic nationalism has been a contributory factor to this result. Another matter often overlooked is the often superior personnel of the modern arbitral court. This is a heresy no doubt, but there is a deal of truth in it. The best commercial judges are regarded with admiration and respect in the city, but there is no guarantee to the commercial litigant that his case will come before a judge experienced in commercial law at all. Recently Talbot J. protested against having to take the Commercial List, on the ground that his experience had lain in other directions. In a commercial arbitration it is always possible to find an umpire, whether lay or professional, who is thoroughly conversant with the subject-matter. Moreover, many of the lay arbitrators have become extraordinarily skilled at their work. To mention only one name, not many commercial judges have had as high a reputation on questions relating to shipping as the late Mr. F. Newsum. He was not only a good judge of fact but his knowledge of shipping law was profound, and his ability to apply it great. Up to a point lawyers are born and not made. Many of the city arbitrators have legal minds and with close attention to the legal rules affecting their particular branches of commerce become exceptionally well equipped to act as judges, for that is in effect the function of the commercial arbitrator or umpire. City men in choosing a third arbitrator or umpire know from experience who is the right man for the job. The Lord

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[1] *The Law of Commercial Arbitration under British, Belgian, Dutch, French, German, Italian and Swiss Law.* Published by the International Chamber of Commerce, headquarters 38 Cours Albert 1er, Paris (viiie).

[2] See, for example, per Scrutton L.J. in *Hillas & Coy. Ltd.* v. *Arcos Ltd.*, 40 Ll.L. Rep. 307.

Chancellor in appointing a distinguished advocate to the judicial bench is to some extent making a shot in the dark. It is not possible to tell in advance whether a good advocate will make a capable judge, unless, indeed, he has already developed and held a substantial practice as an arbitrator. One wonders how often the Lord Chancellor takes this important evidence of ability into consideration.

Arbitration has also been a familiar method of settling mercantile disputes on the Continent, though it does not appear to have attained quite the same proportions as in England. There too, especially in the more highly developed mercantile communities such as Germany, the tendency towards arbitration has become accentuated in recent times and has from time to time given rise to misgiving among those responsible for legal administration.

A modern development of importance, the origins of which could no doubt be traced very far back, is the growth of international commercial arbitrations. These give rise to problems in Conflict of Laws, and in particular there has been difficulty in connexion with the enforcement of awards. This matter was one which early attracted the attention of the League of Nations, and resulted in a Protocol on Arbitration Clauses issued by that body in 1923 which was ratified by the English Legislature in 1924 by the Arbitration (Protocol) Act of that year. The object of this protocol was to prevent parties who being subject to the jurisdiction of different states had signed a submission to arbitration, from afterwards going back on such submission by having recourse to their own courts. This was achieved by giving the other party an absolute right to a stay of proceedings.

This statute, however, was only a tinkering with the problem, and in 1927 the League issued a much fuller protocol dealing with the enforcement of awards and this was ratified in this country by the Arbitration (Foreign Awards) Act, 1930. We are not here concerned with the detailed provisions of these statutes, though it may be said that the English courts now have power to enforce foreign submissions and awards on very much the same terms as if they were English. They are here referred to as indicative of the importance of arbitral procedure in connexion with international commerce. The issue by the International Chamber of Commerce of a series of memoranda dealing with the law as to commercial arbitrations in a number of the leading commercial states shows that the business communities are aware of this fact, and wish to provide themselves with easily accessible information on the point. The project of such an issue appears to have been undertaken about the time of the League of Nations Protocol of 1927, as the first of the memoranda under review—that of Switzerland—came out in October 1927. The others have appeared at intervals, that on the British law being dated 1936. It is to be hoped that the series will be completed at an early date.

Each of these memoranda deals with its subject-matter in clear non-technical language, and with commendable brevity—they are mostly about twenty pages in length. They are all in English except that dealing with the Swiss law, which is in French. No business man with experience of arbitrations should have any difficulty in using any one of these pamphlets for the purpose of getting a general idea of the law as to arbitrations in the country to which it relates. The series should be even more useful to the commercial solicitor who may from time to time have to advise a client as to the preliminary steps in connexion with a dispute relating to foreign business.

The brochure on the British law of arbitration has been ably prepared by Mr. J. E. James, LL.B., of Imperial Chemical Industries. It is for the most part concerned with the English statutes of 1889 and 1934, but contains separate sections on the law in Scotland and Northern Ireland, to which countries the English statutes never applied. In Scotland there is an Act of 1894 which comprises only four sections, concerned entirely with points arising in connexion with the appointment of the arbitrators. The law is therefore almost entirely unamended Common law, and lacks many of the advantages conferred by statute in this country, such as the right to enforce the award as a judgment, a position in which Scotland must be almost solitary. A similarly primitive state of law exists in Northern Ireland.

Considering the wide divergences in both substantive and adjective law between one country and another one is struck by the fundamental sameness of the different systems on the law of arbitration. Differences there are, and these sometimes important, but there are only a very few of such a character as to pull a man up short and say, this system is so different from my own that I will not consent to make use of it. Moreover, the foreign law and procedure are quite often much more flexible and independent of control by the courts than are our own. The Latin countries in particular have devised two separate types of arbitration. The first of these may perhaps be called a formal arbitration, for the procedure must follow more or less that of the civil courts. The other, that of the *amiables compositeurs*, gives the arbitrators practically a free hand to exercise their discretion provided they act honestly and within the terms of their reference. This system, which exists in Belgium, France, Italy and Holland, in a modified form, is much freer and more informal than anything we have here in theory, though there is reason to suppose that in practice many disputes are settled in this way. It is obviously one which might lead to abuse, and it would be very interesting to have some information as to the extent of its use, especially in comparison with the more formal system. In the following notes an attempt is made to summarize the more important divergences between the various systems; to set out their similarities would be tedious and of little value.

With regard to the preliminaries to arbitration in most countries the agreement to arbitrate may be made in any way which brings about a binding contract. Some countries like Belgium and Germany forbid a general undertaking to arbitrate future differences, and in Germany the agreement to arbitrate must be in writing signed personally by the parties. This rather severe rule, however, is relaxed in the case of commercial arbitrations, which are after all the large majority. Conversely, in most countries the submission must be in writing (but not in most Swiss cantons), or there must be something equivalent such as a deed appointing the arbitrators (Italy). Usually the submission must be stamped (but not *e.g.* in Switzerland), and in some cases it must be registered with the court (*e.g.* Italy). Any disinterested person competent in law may be an arbitrator. In Holland women are incompetent. While a professional body or trade organization is naturally incapable (Italy apparently expressly provides so) the practice of leaving the nomination of arbitrators or umpire to such a body appears to be common. The courts have powers to intervene and appoint arbitrators in a number of cases. These are much the same in the various countries.

Procedure at the arbitration must in most countries follow that of the Civil law except where the agreement is for *composition amiable.* In Germany, although there is no system of this latter type, the arbitrators are not bound by the rules of civil procedure and may give their decision in equity. In few countries (Belgium is the chief) have arbitrators the powers which exist in England of summoning witnesses and administering oaths. In cases where the proper conduct of the proceedings requires such powers recourse must be had to the courts (*e.g.* in Germany, France, Holland and apparently Switzerland). In Germany in particular the arbitrators are sadly lacking in powers and there is no method of controlling interlocutory proceedings ; the law seems to be based on the assumption that the parties are really anxious to come to a just and equitable solution, rather than to secure a litigious triumph.

In some countries the arbitrator reaches his conclusions mainly upon documents. This appears to be the case especially in France, Belgium and Holland—in this last-named country, indeed, the parties cannot be heard as witnesses at all. Another point on which there is considerable divergence in practice is as to the position of the umpire or third arbitrator, brought in to decide when the two arbitrators cannot agree. In England the, at first sight, anomalous position has grown up that the arbitrators in a commercial arbitration act as advocates, and the umpire is the judge. Under s. 5 of the Arbitration Act, 1934, when a submission is to two arbitrators they must appoint an umpire. In some foreign systems (*e.g.* Italy and Holland) the law requires that there should be an uneven number of arbitrators, which achieves the same result. Again, while in some countries (*e.g.* Germany) the umpire, when called in, recommences proceedings *ab initio*, it is more common for him to take the matter up from the point at which the arbitrators disagreed (Belgium, France and Switzerland).

The form and contents of the award are chiefly governed by considerations of appeal. In formal arbitrations appeal to the courts is commonly permitted (Belgium, France, Italy, Holland and Germany, though in the last two it must be reserved, or provided for in the arbitration agreement). In these cases it is obviously necessary that the award should give sufficient particulars to enable the appellate tribunal to function, and especially that it should set out the grounds for the decision. Even in the Swiss cantons, most of which do not provide for appeal, it is regarded as important that the grounds of the decision should be stated. In case of *amiable composition*, however, the parties are presumed to have waived their right of appeal, and in most of such cases the award need not set out the grounds (Holland and those Swiss cantons where *amiable composition* is found are apparently exceptions to this).

In all the countries under discussion an arbitral award is enforceable like a judgment of a court. This is not always true of a foreign award, for some countries have not adopted the League of Nations Convention ; in Holland, for example, an action must be brought upon the award as an implied contract to pay, and in Switzerland there are formidable difficulties. The conditions which have to be satisfied in order that an award may be enforced as a judgment naturally vary somewhat. Usually it is required that the award should be filed with the court, sometimes by the arbitrators themselves (Holland). When this has been done some officer, such as the president of the tribunal civil (in France and Belgium), will make the necessary order, after scrutiny of the award to see that it is in proper form, not contrary to public policy, etc.—he will not go into the merits. In Italy the award must be filed like a judgment, and if passed for filing can be executed as a judgment. If it is not filed, together with the submission, it will be treated as a nullity. In Switzerland a few cantons require filing, but in most cantons it is enforceable without any special formality other than those required in the case of any judgment for the payment of a sum of money.

We have already discussed the question of appeals ; there remains the possibility that the court will set aside the award on such grounds as lack of competence in the arbitrators, defect in the submissions and misconduct by the arbitrators. The courts in all the countries concerned exercise powers of this kind, and the grounds of relief are for the most part the same in all countries. In addition, in some states when it is required that the award should set out the reasons for the decision it may be set aside if it does not do so (*e.g.* Germany and some of the Swiss cantons).

R. S. T. Chorley.

JEWISH LAW[1]

The equipment of every comparative lawyer includes some knowledge of the main institutions of Roman Law ; yet how many are aware that there is a parallel system which even possesses *Main Institutions* or that these are of moment in legal history or comparative law ? Selden (as

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[1] *The Main Institutions of Jewish Law*, vol. I, The Law of Property, by Rabbi Dr. Isaac Hertzog, M.A., D.Litt., Chief Rabbi of the Irish Free State. Pp. xxviii +416. (London: The Soncino Press.) 10*s.* 6*d.*

Dr. Isaac Hertzog showed some years ago),[1] was a famous exception: he mastered the Bible in Hebrew; his knowledge of the Jewish code of the second century, entitled the *Mishnah*, and of the Code of Maimonides, was intimate and he himself wrote several monographs in Latin upon Jewish law—upon Inheritance and International Law, upon The Calendar, Jewish Marriage and Divorce, and The Jewish Courts. Modern legal historians, however, seem to be unaware that there was any real progress in Jewish law since the laws of Moses; or they assume that such progress as there was dealt exclusively with matters ecclesiastical. In any case, few studies in comparative law contain even a reference to the legal system of the Jewish people: no useful purpose, it is imagined, could thus by any comparison be served. And yet, excelling in range of time the laws of Rome—for its origins are traditionally dated in the fifteenth century B.C. and its practice has survived to the present day—it is no whit inferior either in range of subject or in method of approach, in the technique of interpretation or in the large and liberal discipline of dialectic which prevailed among the judges and in the schools. The contrast, of course, is more significant than the similarity. But a system which has produced first, a Biblical code; secondly, the *Mishnah*, which in clarity of thought and vigour of language need fear no comparison with the *Institutes*; and thirdly, that *Corpus* of civil and religious law called the *Talmud*—indeed a pandect of the knowledge of the time (to say nothing of the Code of Maimonides in the twelfth century and the other digests of the Middle Ages)—can no longer be safely disregarded by scientific scholars of comparative law.

The task of absorbing and "digesting" this vast and varied material must be the work of a lifetime and can fall to very few. For it requires not only a profound knowledge of language—as well the staccato speech of Aramaic as of Hebrew—but even more, a method of learning to be acquired neither by silent study (as one may acquire "the Classics"), nor even by translation—although the Soncino translation of the *Talmud* is of inestimable value—but only by a long and arduous process of traditional teaching, which, begun in early adolescence, does not cease even with manhood.

None but an outstanding scholar whose intellectual interests are catholic could possess either the competence or the courage to venture upon systematizing in the English language the main institutions of Jewish law. Maimonides, once for all, produced in Hebrew a Code of Jewish Jurisprudence; no one before or since has achieved such authority. Since his day has been piled upon the commentaries still more commentary; the history of law was then unknown; comparative law did not exist as a branch of knowledge and there was no science of jurisprudence. Most modern Talmudists are not, in the modern sense, lawyers. Dr. Hertzog, however, endowed with a capacity of vast learning, is exceptional in that for many years he has sought to equip himself with an understanding not only of the categories and the distinctions of English and Roman law but also of the notions of modern jurisprudence. His extensive learning in the medieval *Codes* and Rabbinic *Responsa* is profound, and when conjoined with exposition in modern juristic terms is well-nigh unique.

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[1] "John Selden and Jewish Law," *Journ. Comp. Leg.*, November 1931.

The present volume—concerned with the law of Property—is one of five into which his subject is to be divided ; the succeeding volumes will deal with Obligations, Family Law, Administration of the Law and Criminal and Public Law respectively.

The outstanding merit—as well as an obvious defect—of the work is that the author, not having had at his disposal (as he admits with regret in his Preface) much of modern non-Rabbinic literature, has almost completely confined himself to original texts. Relieved from any suspicion of superficiality, his exposition stops short, in effect, at the threshold of modern investigation, bare, almost, of reference to the theories of modern writers. True, he says, he has written neither a history nor a comparative study, but as by way of compensation he has striven, with valour and not without success, not merely to state conclusions but to introduce the reader into what he calls his " halakhic laboratory." The structure of Jewish law he regards as " elaborate, massive, towering." " The utter neglect of Jewish law," he thinks, " had meant a serious loss to the cultural progress of humanity."

The scope of the volume is outlined in the Introduction. Jewish law, he there points out, is of wider range than by the term " law " is generally understood ; the moral and ethical are included as well as ritual and ceremonial law. He attempts a classification and a comparison with English legal terms. *Dinim* include all rules relating to " legal rights and duties which have a money-value." Civil law approximately, but not entirely, corresponds. The term is clearly distinguished in Deuteronomy xvii. *Dine makkoth* are laws relating to corporal punishment, but only for ritual offences. *Dine nefashoth*, corresponding approximately to criminal law, include offences against religion.

The short Part I, dealing with Sources of the Law and Fundamental Concepts—the key to the work—will be found of general interest and easy to understand.

Jewish law is primarily pentateuchal (*deorajtha*) and non-pentateuchal (*derabbanan*). The distinction is fundamental and of practical importance because the former is in the nature of " constitutional law " in the Continental sense, in that it is unchanged and technically unchangeable. But a later law may be legally placed in the former category if it has been handed down by oral traditions, or flows from the principles of traditional legal interpretation. Thus the *lex talionis*—an " eye for an eye "[1]—has always in Jewish sources been judicially interpreted as meaning " the value of an eye for an eye " and this signification is regarded not as a reinterpretation but as the original pentateuchal meaning.

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[1] Exod. xxi., 29–30.

Derabbanan law is Rabbinic. The Rabbis often proceeded by *takkanah*, which, Dr. Hertzog says, corresponds with legislation. The legislature was the Great Sanhedrin or Supreme Council of Seventy-one Elders which sat in the Hall of Hewn Stone in the Temple at Jerusalem.

Case law was as rigorously binding in Jewish as it is in English law. Next in the judicial hierarchy—for the Sanhedrin was a judicial as well as a legislative body (cf. the High Court of Parliament)[1]—were the District Sanhedrins, composed of twenty-three persons. Finally came the Local Court of Three, the *Beth Din*, or House of Justice (which still exists and functions). Dr. Hertzog suggests—but without much evidence—that the higher courts could revise the judgments of the lower courts. That the Great Sanhedrin was supreme is undisputed. During the second Temple the development of the law passed from those in the Temple away to the House of Learning, *Beth Hamidrash*, which henceforth became the centre both of legal disputation and, indeed, of law-making. Dr. Hertzog compares the importance of *responsa prudentium* in the Jewish and the Roman systems. In Talmudic disputation it is not always easy to distinguish a judicial decision from an academic discussion. The scholars did not wait for the concrete case in order to elucidate the proper principle. Once elucidated, after discussion between the doctors in the schools, it became the law in future cases. One important distinction, however, Dr. Hertzog fails to point out. The *prudentes* in Rome were not the judges, but they advised the judges, who respected their opinions, whereas in the Jewish polity, the Rabbi was both *prudens* and judge—both the scholar and the administrator of the law. After the *Mishnah*, Jewish scholarship shifted from Palestine to Babylonia and then in the tenth century passed to Spain, where for several centuries it remained. The medieval codes were enacted by no legislature or leader; they were, in effect, the concentrated essence of the law as seen by a world-renowned scholar. Such were the Talmudic *Abridgement* of Alfasi (1013–33), the *Yad Haḥazakah* of Maimonides, the *Tur* of R. Jacob ben Asher and finally the *Shulḥan Arukh* of R. Joseph Karo—the legal mystic of Safed. Karo treated the dicta of Alfasi, Maimonides and Asheri as authoritative, after the *Talmud* and, in case of conflict, followed the opinion of any two of them. Upon the last Code, Isserles wrote a commentary. Says Dr. Hertzog:

> In every period it (*i.e.* legalistic exposition) applied itself with wonderful depth, acumen and resourcefulness to the body of extra-Pentateuchal law inherited from the past, establishing analogies, drawing inferences and deductions, sifting, co-ordinating and fertilizing the old material in a manner which was hardly equalled, let alone surpassed, by the greatest of Roman jurists. (p. 19.)

Dr. Hertzog begins his discussion of "Concepts" with an account of "Persons." Unlike other ancient—and certain modern—systems, Jewish law deprived no person domiciled in the Jewish State of civil or political rights. The alien was subject to the same law as was the native. Women possessed equal rights, but not equal capacities. The age of majority was that of puberty—thirteen for males and twelve for females. As in Greece and Rome, so in Judea slavery was recognized, but the lot of the slave was humanized.

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[1] Some think that there were two Sanhedrins, one religious, the other political.

Turning to " Rights and Duties " Dr. Hertzog does well to state at the outset that Jewish law is " pragmatic " and shuns the abstract and the philosophical. Nevertheless, he is able to distinguish in Jewish law a power (*koaḥ*) from a liberty (*reshut*). There is a variety of terminology for wrongs, and duty is a " pivotal conception of Judaism." The term used is *miṣvah*. On the other hand, *miṣvah* has come to mean an act which is meritorious without being enjoined by law (*ḥobah*). In Jewish law there is no parallel to the English system of legal and equitable rights, although often the strict rigour of the law is mitigated by a more merciful interpretation. There is no talmudic equivalent—it is a strange fact—to the concept " contract " ; *B'rith*, or covenant, is Biblical only. *Tenai* means condition. *Shi'bud* denotes an obligation. Not, of course, that persons are not bound, as we should say, by contract. Thus there are various kinds of bailees who are under varying degrees of liability. Similarly, the transactions of sale and agency, of partnership and so forth, involve further rights and duties, but specialized terms are used.

Part II, containing three hundred pages, is divided into twenty-two chapters. The author has followed the classification in the books on Roman law. Beginning with the concept of Property, he proceeds to examine the meaning of Ownership and he then explains the distinctions and the legal effects of the classification into Movables (*Metaltelin*) and Immovables (*Karka*). After heroically collating all the tenuous and oblique references that he can find upon property in "Immaterial Things," viz. patents and copyright, goodwill and trade marks and trade names—such as a secret art in the manufacture of " shew-bread," a method of the making of incense, a secret prescription or technique in the writing of scrolls (pp. 127, 128)—he passes to the well-defined Modes of Acquisition and Transfer, which are as clear in Jewish as in Roman law. On Partnership (*Shuttafut*) there is abundant case law. To Possession (Chapter XIV) a formidable chapter of fifty pages is devoted, followed by an account of Original and Derivative Acquisition. *Yeush*, the abandonment of the hope of recovering property, and *Hefker*, a formal renunciation of property, are fundamental concepts. Upon *Avedah*, or Lost Property, there is much and curious learning. The rights of creditors over the whole of a debtor's property are treated under *Shi' bud*, Lien. Distinguished from *Shi'bud* was mortgage, or hypothec, called in Hebrew (from the Greek) *Apoteke*.

A reference to some particular points will indicate the character of the work.

Among the sources of Jewish law, Dr. Hertzog gives " The Law of the

(Non-Jewish) State, *Dina de-Malkutha*" (p. 24). This is a short, clear and succinct *excursus*, of value as showing how the Jewish system has always regarded the law of the particular country as law. The maxim comes from Samuel, a Babylonian teacher, jurist, astronomer and physician (A.D. 180–257). The author explains the origin and the application of the principle to *dine Mammonoth*, "the law concerning money-values" (p. 27). Indeed, the *Mishnah* lays it down that all legal instruments (with two exceptions) executed in the municipal courts are valid. Maimonides applies the principle to public law only, but Dr. Hertzog applies the principle to private law.

Another short and interesting chapter of lucid analysis is that which explains the General Concept of Property (Chap. III). A popular term is *nekḥasim*—the word for "tangibles"—which, in origin, the author thinks derives from *nakḥas*, to slaughter, and hails from the days when property consisted mainly of cattle. The parallel is *peculium*, *pecus*. *Nekḥasim*, therefore, really denotes *bona*, while *kinyan* is more comprehensive and includes the right of property, both in one's own goods and *in re aliena*. *Kinyan* is not treated systematically in the Talmud, but Maimonides has collated, in his twelfth book, all the various manifestations of *Kinyan*. But the term—like many a Roman term—must perforce do service for several meanings. It denotes three things: the mode of acquiring, that which is acquired, and the right of owning.

Ideas reminiscent of other systems are profusely found. *Omne quod inaedificatur solo cedit* finds its parallel in *Kol hameḥubbar la karka' ke karka* (p. 86). The Roman slave was *res mancipi* and the Hebrew slave was regarded as part of the land, *karka* (p. 95). A mere verbal release was not binding upon the master. Again, *karka* cannot be stolen, for it is deemed to be in the *reshuth*, or "possessing domain" of the owner (p. 104 citing *Baba Kamma* 117). Under a constitution of Diocletian and Maximian a vendor could refuse to carry out a contract if the price were less than half the value of the goods. It has been conjectured[1] that this constitution was derived from the Jewish law of *'onaah* (or over-reaching), whereby, if there were an "over-reaching" of one-sixth of the price, the party aggrieved might recover such amount, whereas if it exceeded one-sixth, the sale could be rescinded (p. 113). Land, however, was excluded from the rule. The reason for this exclusion has never been satisfactorily explained, and Dr. Hertzog tries his hand in an endeavour to arrive at a *rationale*. Dickstein's explanation—upon the analogy of *res nec mancipi*—is that land, *karka*, was *extra commercium*, and the law of *'onaah* originally applied to such things as were habitually bought and sold (p. 115). This theory Dr. Hertzog rightly rejects, applying the historical method that Buckland uses with such success in Roman law. Biblical law expressly includes land in the context of *'onaah*; a later institution must have excluded land from its purview, either because there was no market price for land or because to a sale of land—normally preceded by investigation, deliberation and negotiation—the principle *caveat emptor* applied. Later, when values became ascertainable and transactions more speedy, a compromise was made and a rule was enacted that when the overcharge or undercharge was excessive—*laesio enormis*—*i.e.* exceeding one-half of the value, the transaction could be rescinded (p. 117). Again, the rule *Traditionibus et usucapionibus, non nudis pactis* has something of a parallel in a certain Palestinian *boraitha*—or *extra-Mishnaic* statement to this effect :

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[1] By P. Dickstein. *Hamishpat Haivri*, vol. I, p. 10. Jerusalem, 1926.

> Originally acquisition of property was wont to be made by the symbol of drawing off the shoe : later the custom arose to acquire property by *kesasah* (cutting off) ; still later they began to acquire property by *keseph* (money), by *shetar* (written deed) or by *hazakah* (the performance of a possessory act). What is *kesasah* ? When one sold his paternal estate his relations brought a bowl filled with parched ears and nuts and broke it in the presence of children : the latter picked them up and said, " This man has been cut off from the heritage of his fathers," and when he bought it back, they did the same and called out, " This man has returned to his fathers' heritage." [1]

Dr. Hertzog's treatment of the modes of transfer is particularly illuminating. The note on *shetar* (pp. 152–5) will be found of great value by students of comparative law. A Palestinian dictum ran to the effect that the property in a house passed with the delivery of the key (p. 159), but this was not a statutory mode of transfer and may well have been a later Palestinian variation (see the long note on p. 160). Although it was only by a statutory mode in general that property passed, an imprecation, or *ḥerem*—specifically called a *mi-shepar'a*—was publicly pronounced in court upon a person who sought, under certain circumstances, to retract from his promise :

> He who inflicted (*mi-shepar'a*) punishment upon the Generation of the Flood and the Generation of the scattered will also punish one who does not stand by his word (p. 175).

Dr. Hertzog states his aim as follows :

> . . . to give a systematic presentation of Jewish law under general jurisprudential concepts in a form readily intelligible and easily acceptable to the average reader nurtured upon modern Western ideas and accustomed to Western standards.[2]

A systematic form, it is true, has been adopted, embracing the concepts of jurisprudence, but the result is far from being " readily intelligible." Nor will it be understood by the average reader. It seems to the writer—with becoming respect to such an authority—that Dr. Hertzog has sought to combine two methods of approach. He has striven to give a statement in simple dogmatic form of the main rules and yet he has inseparably infused into all this—as in a Talmudic disquisition—a complex argumentation both of history and of theory. The result is a work not for " the average reader " but for the scholar possessing a firm grasp and wide knowledge who may perforce read and reread paragraphs and pages before the meaning of the author becomes clear.

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[1] P. 138, cited from the *Jerusalem Talmud, Tractate Kiddushin*, Chap. 1.

[2] Introduction, p. xxiv.

Moreover, the style of the author requires drastic pruning, and a ruthless revision might have secured the deletion of many a rhetorical passage—irrelevant in a work on *Main Institutions*—of much tautology and turgid epithet, as well as the correction of many obvious mistakes.

The common mistake is made of the effect of the Judicature Act of 1873 (p. 55). 1835 must be a mistake for 1875. When it is said (on p. 64) that: " Jewish law insists upon actual consideration in cases where English law is satisfied with a *promise of consideration*," does not the author refer to *executed* and *executory* consideration, respectively? On p. 70 for *mortgagor* (on line 12) read *mortgagee*. And, of course, *dominium ex jure quirito* should read *quiritium*. Similarly, on p. 83, for *omnia* read *omne quod aedificatur solo cedit*. Of *gezelah* the correct translation is not larceny but robbery (p. 99). The nearest term for larceny is surely *genebah*. The term " bill of sale " is used when conveyance is meant, or document of title (p. 150).

The style is frequently marred by words at which not Mr. A. P. Herbert alone must shudder. To " loan " a house is not a term of art, and if " borrower " is good enough for Shakespeare why write " loanee " (p. 88)? Has Dr. Hertzog caught a breeze from beyond the seas? Why is the account of the purchase by Abraham of the Cave of Machpelah " very circumstantial "? Circumstantial! The description of the negotiations with the local Council of Elders for the purchase, their consent as required by law, the fixing of the price, the identification of the parcels, indeed, a statement in summary form of the conveyance—is not all this as " direct " an account as one may find? [1]

Such defects are pointed out with particularity so that they may the more easily be avoided in the subsequent volumes, which will be awaited with interest.

The Index of Texts (pp. 398–407) might have been so divided as to ndicate to the general reader the ancient, medieval and modern sources. Nor would a short bibliography of monographs in French, German, Hebrew and English be out of place. Finally, no work on Jewish law may now disregard with safety the recent Soncino translation of the Babylonian Talmud,[2] in the service of which most of the Rabbinic scholars of Anglo-Jewry have been enrolled.

George J. Webber.

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[1] Gen. xxiii.

[2] Edited by Dr. Isidore Epstein. Soncino Press, London. Nine volumes already published. About thirty are projected.

THE LAW OF CONTRACT IN SOUTH AFRICA.

THE distinguished author of this work [1] died on September 6 of last year. Though he was deeply versed in all the old literature of the Roman-Dutch law and of allied Continental systems, he would perhaps have agreed with the remark of the late Dr. James Williams of Lincoln College, Oxford: "There is probably no other system in which the textbooks are as antiquated and in which such rusty weapons come to the hand of the practitioner." [2] For this reason he was an ardent advocate of codification. For a time he entertained the project of drafting a code single-handed. But, abandoning a task for which his judicial duties left insufficient leisure, "he decided [so Mr. Roberts tells us in a life of the author prefixed to this volume] to confine himself to a particular branch of the law, and to prepare the ground for its subsequent codification, by a systematic treatise based on a comparative study of all available writers, ancient and modern. He selected the Law of Contract, and, taking as his starting-point the Obligations of Pothier, for whom he had the greatest admiration, spent the leisure time of some ten years in the completion of the manuscript." Even this more limited undertaking, though it seems that only the *ultima manus* was needed to bring it to completion, had to be laid aside. In an Introduction written by the author in March of last year, he says, "The work was written long ago, and abandoned some fourteen years ago, and would never have seen the light of day but for the energy of Mr. Advocate Adrian Roberts, who has brought it up to date and is responsible for the translations and the footnotes." The task of revising a work of this magnitude, as may well be believed, "proved a formidable task." Mr. Roberts acknowledges himself to be deeply indebted to the help of Professor Colin Murray of the University of the Witwatersrand and his son Mr. Ian Murray. So far as the present reviewer is able to form an opinion, Mr. Roberts and his assistants have achieved a high measure of success. One feature for which most readers (sad to say) will be grateful is that the editor has supplied in footnotes translations of all the Latin citations in the text. These seem to be accurate. There are, of course, occasional slips, so easy for a reviewer to detect, so difficult for an author or editor to avoid. Thus, on p. 111 (last line) "sit" has been printed instead of "fit," with the consequence that "*quod*" is translated "since" instead of "which." On p. 120 a quotation from Baldus is mistranslated. Reference is made here and there (*e.g.* p. 121) to a little work, *Beginselen*

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[1] *The Law of Contract in South Africa.* By the Rt. Hon. Sir J. W. Wessels, Kt., P.C., B.A. (Cape), LL.B. (Cantab.), Hon. LL.D. (S.A.); Late Chief Justice of the Union of South Africa; Author of *The History of Roman-Dutch Law.* Edited by A. A. Roberts, B.A. (Cape), B.A., LL.B. (Cantab.); of the Middle Temple, Barrister-at-Law; Advocate of the Supreme Court of South Africa; one of the Law Advisers to the Union Government; Author of *A Guide to Voet.* (Johannesburg: Hortors Limited, 1937.) In two volumes, £6 10 0. Volume I, pp. xix + 839, £3 3 0.

[2] *Yale Law Review*, vol. xix (1910), p. 156.

des Rechts, which passes under the name of Voet. It has perhaps escaped notice that this is a translation of Voet's short *compendium* of the Roman law called *Elementa juris* augmented with extracts from Vinnius *ad Institutiones* where that author refers to some matter of modern practice. Consequently any reference to the *jus hodiernum* to be found in this book must be credited not to Voet, but to Vinnius. These and other such little matters are of comparatively small account in a work of this magnitude.

The whole work is divided into two volumes. The first (which alone is the subject of this review) is concerned with the Formation, Operation and Discharge of Contract. The second volume, now in the press, is devoted to *Mora*, Breach, Remedies, Penalties, Quasi-contracts, Suretyship and Sale. In effect, therefore, this volume contains the whole of the Substantive Law of Contracts in general.

Sir John Wessels has drawn his material from a very wide range of legal literature, old and new. The wealth of citation is sometimes overwhelming. Many chapters or sections of the book begin with a list of authorities. For example, under the head of *Fraud* the following *References* are given: "Dig. IV. 3; Cod. II. 20 (21); Zoezius *ad* Dig. IV. 3; Noodt, *De forma emendandi doli mali*; Glück; Koch, *Forderungen*; Molitor; Van Wetter, *Obligations*; Voet; Pothier; Unterholzner, *Schuldverhältnissen*; Baudry-Lacantinerie & Barde, *Obligations*; Anson, Pollock, Lawson, Leake, *Contract*; Kerr, *Fraud and Mistake*." Of course, a vast number of cases are cited from the South African and also from the English reports.

A few special questions may be selected for comment. Is there any place in South African law for *pollicitatio* as an institution distinct from Contract (*duorum pluriumve in idem placitum consensus*)? A question put in argument by de Villiers J.P. in *Bloom* v. *American-Swiss Watch Co.*, [1915] A.D., at p. 101 (offer of reward for information) suggests the possibility. Wessels, but not very distinctly, seems to negative it (p. 18). In connexion with offer and acceptance through the post Wessels seems to accede to the *expédition* theory adopted by Kotzé J. in *Cape Explosives Works, Ltd.* v. *S.A. Oil & Fat Industries, Ltd.*, [1921] C.P.D. 244, but I do not find any mention of the express reservation of the question by the A.D. in *McKenzie's Case*, [1922] A.D., at p. 24. In this connexion a passage from Voet (5. 1. 73) is more than once cited. On p. 50 there is an inexact paraphrase taken from Sampson's translation. The effect is more correctly given at p. 37.

Few students of South African Law will be inclined to disagree with Wessels when he says (p. 23) "The requirement of a reasonable cause does not add to or take away much from our idea of a contract"; but he continues (after citing authorities), "it seems hazardous at present to say that a reasonable cause is not one of the requisites of a valid contract."

A good deal of space is devoted to illegal contracts. *Inter alia*, it is said (p. 204) that "An agreement between husband and wife made before or at the time of marriage, that the wife should not be called upon by the husband to live out of England during the marriage, is considered to be *contra bonos mores* by the Roman-Dutch Law, and cannot be enforced by our courts as being opposed to one of the main purposes of marriage." This reproduces (in effect) the head note to *Webber* v. *Webber*, [1914] W.L.D. 51. No mention is made of the fact that the case went to the Appellate Division, but on a different point, the Court of first instance having directed that the plea based upon the above-mentioned clause in the ante-nuptial contract should be expunged. Thereupon Innes C.J. remarked (*Webber* v. *Webber*, [1915] A.D. at p. 241), "The correctness of the order was not questioned on appeal; indeed, counsel for the defendant definitely acquiesced in it. So that, without expressing any opinion upon the point, etc." The question, therefore, cannot be regarded as settled and, when it is reconsidered, account must be taken of van der Keessel's opinion that such a contract is not invalid. *Attamen legi prohibitoriæ, vel bonis moribus, vel naturæ matrimonii contraria pacta non valent; quo tamen in numero non est illud, ne maritus invita uxore domicilium mutet quamvis hic dissentiat Voet ad t. D. de jud. n.* 101 [Voet, 5. 1. 101] (Van der Keessel, *Theses Selectæ*, num. 228).

Under the topic of assignment of leases it is said (p. 553), "In the Cape Colony a distinction has been drawn between leases of urban and those of rural tenements. In *Parkin* v. *Lippert*, [1895] 12 S.C. 187, the Court decided that the lessee of an urban tenement may effectually assign his obligations without the consent of his landlord, because the law presumes that such leases are entered into with the lessee and his assigns." "But this view," Professor Wille says, in his *Landlord and Tenant in South Africa* (2nd ed., p. 103), was subsequently discarded.

The subject of *stipulatio alteri* is sketchily treated (p. 559 ff.). We are as far as ever from a systematic and satisfying examination of the law of South Africa on this topic. Reference is made in a note on p. 561 to a very apposite comment by Mr. I. B. Murray on the judgment of de Villiers C.J. in *Tradesmen's Benefit Society* v. *Du Preez*, (1887) 5 S.C. 279 (the earliest of the series of modern cases): "It is interesting to observe that Lord de Villiers, while adhering to his opinion that valuable consideration is necessary to the validity of a contract, was prepared to allow a third person to sue on a contract made for his benefit, although it is the doctrine of consideration which has in English law always proved an insuperable stumbling-block to the acceptance of the doctrine of the *stipulatio alteri*."

It would be unreasonable to expect a book prepared for the press under the difficult circumstances which have confronted Mr. Roberts and his collaborators to be perfect. Indeed, it is well known that reviewers, not authors, reach this high standard. But they may unreservedly be congratulated upon a very solid piece of work, which will not detract in any way from the high literary reputation of the eminent Chief Justice, whose recent death we deplore.

R. W. L.

SOUTH AFRICAN LAW OF JURISDICTION.

This is apparently the first book [1] of its kind written with special reference to the law prevailing in the Union of South Africa, and in view of some peculiarities derived from the Roman-Dutch law and still persisting, it is well that students and practitioners, who have hitherto consulted English and American works, should have their attention called to these peculiarities.

The author's aim, as the Preface suggests, is to deal primarily with South African law and only to touch upon the Roman-Dutch law, from which it is mainly derived, " to show the foundations upon which the South African law rests." He has succeeded admirably in his exposition of the law, and though one cannot always agree with his views on controverted points of law, one is compelled to admit that he usually reaches his conclusions with remarkable clarity of reasoning.

The author complains that the Supreme Court of South Africa has not authority in respect of the whole Union, as it is only the divisions of the Supreme Court which as such have jurisdiction to entertain actions. These divisions correspond to the old Supreme Courts of the pre-Union Colonies and their local and circuit divisions. There can be no doubt that he has made good his point that much of the uncertainty encountered in South Africa on the question of jurisdiction is due to this fact, and he suggests, therefore, that " the time is long overdue for the creation of a single Supreme Court of South Africa in fact as well as in name." He is, however, pessimistic and thinks that owing to the apathy of the public and of Parliament the evil will not soon be remedied.

Students of the Common law will no doubt be surprised to hear that the South African Superior Courts can only assume jurisdiction against a non-resident or non-domiciled peregrinus by the attachment of his goods or the arrest of his person within the jurisdiction. The learned author quite rightly states that in many cases where it is sought to justify this medieval practice on the ground of " effectiveness," it is (apart from the arrest of the defendant's person) generally impossible for the South African courts to make the judgment against such a defendant effective, since it has been held that property of the most trifling nature may be attached in order to found jurisdiction. The author also contrasts the practice of arresting the defendant himself with the Anglo-American doctrine that mere service of the proceedings on him is regarded as equivalent to the arrest of his person, and he quotes the words of Mr. Justice Holmes in *Michigan Trust Co.* v. *Ferry* [2]:

> Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's

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[1] *The South African Law of Jurisdiction.* By Walter Pollak, M.A. (Rand and Cantab.), LL.B. (Cantab.), S.J.D. (Harvard), of the Inner Temple, Barrister-at-Law, Advocate of the Supreme Court of South Africa. (Johannesburg: Hortors Ltd., 1937.) Pp. xxi + 265.

[2] (1913) 228 U.S. 346; Beale, *Cases*, vol. ii, p. 751.

> pleasure. But when that power exists and is asserted by service at the beginning of a cause . . . we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute.

It is hoped that the Union Legislature will take cognizance of the rebuke and amend the law so as to bring an otherwise excellent system into harmony with more refined ideas, even though the South African doctrine has obvious advantages to South African plaintiffs.

What is, however, surprising is that while South African law permits, and, in fact, insists upon, attachment of the foreign defendant's person or property as a necessary preliminary to its Superior Courts' assumption of jurisdiction against him, it quite unjustifiably refuses to recognize a foreign judgment sounding in money when the foreign court has based its jurisdiction upon the attachment within the State of property of the defendant.

It is interesting to note that though it is necessary to attach a peregrine defendant's property in South Africa in order to give the court jurisdiction over him, the court still requires to be satisfied that it has jurisdiction to entertain the suit *ratione domicilii*, *ratione rei sitæ* or *ratione loci contractus*, where the plaintiff is also a peregrinus.

The author appears to be in error when in his footnote to p. 23 he relies upon the decision in *Darrah* v. *Watson*[1] as an authority for his statement that Anglo-American law will permit a court to assume jurisdiction merely on the ground of the defendant's presence and of his being served with process within it. A perusal of the report of the case will show that it was assumed that the cause of action arose in Virginia and, therefore, the Virginian court had jurisdiction over the defendant, who was then residing in Pennsylvania, but who was served with process during his stay of only a few hours in Virginia.

In regard to divorce, the author points out that the English doctrine that jurisdiction in matters of divorce depends upon domicile was incorporated into the law of South Africa by the decision of the Privy Council in *Le Mesurier* v. *Le Mesurier*,[2] and the case law on the subject cited by the author consequently reminds an English practitioner of much with which he is familiar. Towards the end of the chapter dealing with this topic, the author leaves the domain of positive law and, impelled by natural sympathy for the unhappy victims of the existing law as to jurisdiction, suggests that the law should be amended so as to permit of a division of the Supreme Court of South Africa granting a divorce where the husband (petitioner) is not, but the wife (respondent) is, domiciled in the Union or where the wife (petitioner) is, and the husband (respondent) is not, domiciled within the Union. The author submits views in support which are based largely upon the American law on the topic. In the second of the examples given, viz. the wife (petitioner) domiciled in the Union and the husband (respondent) not domiciled in the Union, the author submits that the wife, being domiciled in the Union, will in the great majority of cases spend the rest of her life in the Union and will never be affected by the non-recognition of her divorce outside the Union. What of the position of the husband? Admittedly he may be regarded as still married in the country of his domicile, whereas in the Union he would be regarded as divorced. The author asks: "Is the Union, however, to refuse to do justice to a wife who is domiciled (in the Union) merely because, if it does justice to her, it may place the wife in an unenviable position? If a certain measure of injustice is inevitable, ought not the wronged wife be spared it, rather than the husband who has disregarded his matrimonial obligations?" As to the first of the examples given, viz. the husband (petitioner) not domiciled in the Union and the wife (respondent) domiciled in the Union, the author suggests that the answer to the argument based upon non-recognition of such divorce outside the Union is surely that if the husband is prepared to take the risk of such non-recognition, that is his affair and that the South African court should be entitled to alter the status of the wife who is domiciled in the Union.

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[1] (1873) 36 Iowa 116; Beale, *Cases*, vol. i, p. 253.

[2] [1895] A.C. 517.

The author has done his work well, and it therefore may seem ungenerous to mention that there are one or two clerical mistakes and at least one faulty reference. The work is carefully written, and though serious students of law will appreciate the author's methods, busy practitioners should also find this an extremely useful book for quick reference, the index to which is well above the average.

GILBERT DOLD.

HIGH COURT OF ADMIRALTY IN SCOTLAND.

THE volume of Acta here printed [1] is the oldest extant record of the High Court of Admiralty in Scotland. The first four folios consist of notarial memoranda, which are printed as an appendix. The rest of the book consists of the formal records of the court between September 6, 1557 and March 11, 1561–2, with two breaks between November 18, 1558 and February 3, 1558–9, and September 15, 1559 and August 28, 1560. They are brief formal records which set out the formal stages in the action, sometimes the point at issue, and sometimes the sentence. There is no account of the legal reasoning which the parties used to support their claims, or which the Court used to explain its decision. But the records show us the kind of cases which occupied the attention of the Court, and illustrate the rules of the procedure by which they were tried. It is clear from these records and also from Welwod's *Abridgement of All Sea-Lawes* (1613) that the jurisdiction of the Court was wide. Welwod, says Mr. Wade, "lays it down that the Judge Admiral should take cognizance of disputes between merchants and mariners and also upon all complaints, contracts, offences, pleas, exchanges, insurances and all other businesses whatsoever among seafarers, and adds a series of technical and criminal offences also coming under his jurisdiction"; and he points out that though these records do not contain cases on all these matters, they cover a range which is wide, considering that they are confined to a space of only three years.

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[1] *Acta Curia Admirallatus Scotiæ, 6th September*, 1557–11*th March*, 1561–2. Edited by Thomas Callander Wade, M.A., LL.B. the Stair Society. (Robert Maclehose, Ltd.) Pp. xliv + 265.

Mr. Wade has prefixed to the Records a very interesting Introduction which will help the reader to understand them, and a useful and very necessary glossary. He points out that the origin of the Admiralty Courts is not known, but that they seem to have been set up in imitation of the English practice. There was a High Court sitting in Edinburgh or Leith presided over by vice-admirals, and local Admiralty Courts in different parts of the country. At whatever time they may have originated "it is safe to say that the Admiralty Courts in Scotland were in existence from the time that the office of Admiral became hereditary in the Bothwell family (1488)." The High Court exercised jurisdiction over the whole of Scotland. It was inferior to the Court of Session, with which it had occasional disputes; but no such conflict arose as that which broke out in England at the end of the sixteenth century between the English Common-law courts and Court of Admiralty. A clear account is given of the procedure of the Court, and of the sources of the law which it administered. Mr. Wade points out that some of the most interesting of the cases arise out of privateering which was carried out under the authority of Letters of Marque and Reprisal. The evil effects of these Letters which authorized reprisals are illustrated by the use made of the Letters granted to Andrew Barton and his brothers in 1506. They were still being used by the Barton family to cover piratical acts on the high seas in 1561; they caused diplomatic difficulties between England and Scotland; and it was not till 1563 that they were cancelled by an Act of Parliament.

The book is very well printed. There is a digest of cases and good indices of persons, places, ships and subjects. But it would be much more convenient if the notes to the Introduction were printed at the foot of the page and not all together at its end. W. S. H.

JUDICIAL PRECEDENT IN SCOTS LAW.

The title of this book[1] does not do full justice to Dr. Gardner's valuable essay, for one-half of its pages are devoted to a discussion of the English and French doctrines of *stare decisis*. Although, of course, the major contribution which this book makes to the science of jurisprudence is to be found in the new light which it throws on the history of judicial precedent in Scots law, still the foreign reader will find the author's penetrating references to the other legal systems of almost equal value. As Lord Macmillan says in his graceful introduction, " Of special interest is the exposition of the French theory and practice which he furnishes by way of contrast and illustration, as befits so devoted a student of Comparative Law."

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[1] *Judicial Precedent in Scots Law.* By John C. Gardner, B.L., Ph.D., F.S.A.Scot., Solicitor. With an introduction by Lord Macmillan. (Edinburgh: W. Green & Son, Ltd., 1936.) Pp. xx + 108. 5*s*.

As Dr. Gardner is the first writer to deal in detail with the Scottish theory of precedent, it is an exciting adventure to follow his exploration of its chequered history. We cannot find in Scotland anything comparable to the English Year Books, and there is not, therefore, much material concerning the authority of decided cases in Scotland prior to the institution of the Court of Session in 1532. It is true that after 1349 the " pronouncement " of the court was entered in the register of the court, but these " pronouncements," containing only the actual judgments themselves, were not reports, in the true sense, of the cases. In 1532, however, James V ordered that one of the Lords of the College of Justice should keep a Journal of Decisions. The earliest collection of these appears to be Sinclair's *Praticks*, covering the period from 1540 to 1549, to be followed by a number of others during the sixteenth and seventeenth centuries. Of these collections Dr. Gardner says that they cannot be regarded as indicating the establishment of the doctrine of *stare decisis*, although they were in fact a first step towards the acceptance of that doctrine. Towards the end of the seventeenth century judicial decisions appear to have been regarded as a source of law, but the doctrine is more akin to the Continental view of precedent than to the English one. Thus Lord Stair in his *Institutions*, 16, was careful to draw the essential distinction, which is sometimes forgotten by modern writers, when he said : " But there is much difference to be made betwixt a custom by frequent decisions and a single decision which hath not the like force." By the middle of the eighteenth century there is evidence of English influence in Scottish case law, although Erskine seems to cling to the older view. During the nineteenth century the English doctrine steadily gained in favour, so that (p. 32) " it can scarcely be denied that at the present day Scots law has become a system of case law and a follower of the doctrine of *stare decisis*, very nearly, if not quite, to the same extent as English law." It is interesting to note, however, that as late as 1901 Lord Dunedin proudly claimed for the Scots law that, " We have never been the slave of precedent, as the English law has been." Dr. Gardner's slight reservation concerning the modern doctrine in Scotland is due to the fact that there is some doubt whether each Division of the Court of Session is absolutely bound by its own previous decisions, or whether a decision of the whole Court of Session is binding on another whole court. The recent case of *Sugden* v. *H.M. Advocate*[1] seems to leave this point in doubt.

It is tempting to discuss here Dr. Gardner's brilliant comparison of the English and French doctrines, but that would involve us in an essay instead of a review. We wish, however, to join in the high praise which he gives to Dr. Ancel's article *Case Law in France*, which was published in vol. xvi, part 1 of this *Journal*. In comparing English and French law Dr. Ancel said: "In substance the great difference results from the absence of the rule *stare decisis* and its consequences. No French judicial decision is ever properly speaking a precedent; one does not know if to-morrow the solution laid down in a decided case will not be disregarded or reversed. Case law results, therefore, in France, not from an obligatory leading case, but from a whole series of decisions which have followed a particular interpretation of the law. If, later on, the first decision takes the aspect of a leading case, that happens solely because in the course of time other decisions have accepted the principle which it consecrated."

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[1] 1934, J.C. 103.

There is only one point on which we differ with Dr. Gardner, and that is solely on a question of emphasis. "This difference in the respective attitudes of these systems to the doctrine of *stare decisis*," he remarks at page 8, "is much more significant in theory than in practice." This, of course, is a matter of opinion, but we believe that the difference is still of great practical importance. We need only compare a French textbook with an English one to see how differently the authors approach their subjects. If it is said that this is a question of teaching and not of practice, the answer can be found in Maitland's words that "Taught law is tough law": it does not seem to me to be possible that students who have been taught along such different lines will approach a problem from the same standpoint when later they practise in the courts or sit on the Bench.

A. L. GOODHART.

A LEGAL SYSTEM IN THE MAKING.

PROFESSOR ESCARRA has rendered very great service to China, during the period in which that country has been evolving a new legal system, by his assistance and advice to the Chinese Ministry of Justice over a period of fifteen years. He has now added to those services by the publication of an important and extraordinarily interesting book, which surveys the whole of China's legal system in the actual process of construction,[1] and which is the result of an investigation undertaken on behalf of the Chinese Government. It must not be assumed from this that Professor Escarra has contented himself with praising what has been done, considerable though it is. He is always an acute, and sometimes a severe critic, and the reader puts down his book with a lively sense of Professor Escarra's uncompromising idealism, especially upon the topic of legal education. The present reviewer was painfully conscious that some of the defects which the author roundly condemns in modern Chinese legal education exist, in a modified degree, in our own system ; but of that more later. It is necessary first to say something of the scope of the book. It is not a detailed exposition of the present-day law of China, nor is it a treatise upon Chinese legal history. It is conceivable that the materials for the latter study do not yet exist in their entirety, although Professor Escarra shows in the present book that they are rapidly being assembled, and to some extent collated and assessed. *Le Droit Chinois* is, on the other hand, a complete survey of the main institutions of modern Chinese law, with an account of their evolution, of the Chinese judiciary, of modern Chinese education and of China's judicial outlook, again with an attempt to place it in historical perspective. Throughout, Professor Escarra shows an acute perception of what modern Chinese lawyers are trying to do, and an appreciation of the difficulties they have faced, which, nevertheless, does not cause him to relapse into uncritical panegyric. Even lawyers who have no special interest in China's legal renascence will find much that is stimulating in his book, and it may be that he will arouse in them a curiosity which can only be satisfied by perusal of some of the volumes in the very full, classified and critical bibliography which he includes.

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[1] *Le Droit Chinois*. By Jean Escarra. (Paris: Librairie du Recueil Sirey.) Pp. 574. 95 francs.

Perhaps one of the most striking features of Professor Escarra's book is that he pleads ably for a retention of distinctively Chinese characteristics in the new system which is in process of gestation. There is a fundamental social problem here. China has inherited from remote antiquity a comprehensive culture which still dominates Chinese thought. Why attempt to cut off the law from it ? Western conceptions have not always been an unqualified boon, as the author shows in a vigorously worded passage on pp. 82–3. As a matter of fact, Professor Escarra's view finds more and more favour with China's leading lawyers, and the longer the process of legal evolution is delayed, the greater will be the influence of traditional conceptions upon the completed fabric ; immemorial custom will eventually play its true part in shaping the legal institutions of a people with the longest continuous history in the world. Significant proof of this is afforded by the provisional constitution drafted in 1935, of which Professor Escarra says (p. 143) :

" Il est hors de doute que la portion éclairée de l'opinion publique a suivi la préparation du projet de 1935 avec un intérêt passionné. C'est d'ailleurs un œuvre techniquement remarquable. Un très grand effort a été fait pour tenir compte, dans la mesure la plus équitable, des traditions gouvernementales de la Chine et des exigences de l'évolution actuelle du pays."

On the other hand, the author is at variance with the Chinese codification Commission on the question of the separation of civil and commercial law. It was originally intended to have distinct civil and commercial codes, but this plan has not been carried out. There is a single civil code, with supplementary codes on special topics. This is defended on the ground that there is no special mercantile class in China, but to this

Professor Escarra replies that guilds have a very ancient origin in China, and have played a most important part in civic life—a part which has tended to increase, since the disintegration of higher government, following the expulsion of the Manchus. It is, in fact, on the ground that it represents a break with China's traditional life that the author criticizes the plan which has been adopted.

The chief trouble with this book from the reviewer's standpoint is that there is so much that is suggestive and provocative, and which therefore ought to be mentioned. Thus, in England we are accustomed to regard the French codes as suitable, *par excellence*, for imitation in other countries engaging in codification. In the modern Chinese civil code, however, there is no reference to the French civil code. How is this ? Professor Escarra affords an explanation (p. 177) :

" L'absence du code civil français dans l'énumération faite au texte ne doit pas être interprétée à faux. On peut bien penser que les conseillers français de la commission n'ont pas oublié le rôle, à tout jamais glorieux, de leur pays en matière de codification. Mais d'une part, ils ont été convaincus qu'il est contestable, et d'ailleurs vain, de chercher à imposer à un pays de très vieille et très haute civilisation une legislation qui est elle-même le produit raffiné d'une autre grande civilisation. D'autre part, ils ont dû reconnaître que, sous son aspect actuel, encombré des additions legislatives de plus d'un siècle, surchargé par une construction jurisprudentielle d'une importance et d'une valeur inégalées, un code daté de 1804 est un modèle difficile à proposer à une nation soucieuse de connaître les plus récentes productions de la science juridique occidentale. Nous savons, nous Français, que tel article de notre code dit la même chose que l'article équivalent du code allemand, suisse ou brésilien. Nous savons aussi qu'il l'a dit cent ans avant les autres et avec une précision de langage qui n'a jamais été atteinte. Mais il y a sur cet article un siècle de jurisprudence et, s'il est facile de copier un article de code, connaître une jurisprudence et en comprendre l'esprit, surtout quand il s'agit d'une jurisprudence aussi subtile, aussi nuancée que la nôtre, est une chose à peu près impossible pour des étrangers. Nous payons ici la faute commise en n'entreprenant pas, au lendemain de la guerre, une refonte de nos codes qui en eût fait, pour le monde entier, des modèles. Mais en dépit des remarques qui précèdent, il est superflu de déclarer que les membres français des commissions de codification ont utilisé, dans toute la mesure possible, les matériaux que leur offrait, en abondance, leur pays."

It is this mixture of enthusiasm and shrewd comment which makes Professor Escarra's book so attractive to read, and when he comes to discuss the modern system of Chinese legal education, he has many valuable comments to offer. Modern Chinese legal education has developed too rapidly, and its imitative capacity at present probably exceeds its creative ability. The author sharply criticizes existing examination standards, and justly asks what real value to the Chinese student can accrue from asking questions (in the final examinations), such as: "Discuss the sociological theories of Dean Pound," or "Discuss the juridical works of Duguit." Such questions, Professor Escarra observes, would not be set in any French legal examination; they would be fitting subjects for a thesis (p. 416), and he urges that the universities should pay more attention to traditional Chinese legal theories. Whether his readers agree with all his views or not, they cannot fail to admire the loftiness of purpose which inspires every page of this much-needed and stimulating book, which has a value altogether distinct from its subject-matter.

G. W. KEETON.

NATIONALITY IN THE BRITISH COMMONWEALTH.

THE Royal Institute of International Affairs, or, as it is more generally known, Chatham House, is fostering a school of contemporary history which has a distinctive character. Professor Arnold Toynbee, in his annual Survey of International Affairs, places each year the international events of the last period in a background of world history, and does it with a wealth of allusion and a brilliance of style that make the story of the most recent events comparable with the mature studies of ancient and mediæval history. Now Professor Hancock of Birmingham University initiates a new survey of British Commonwealth Affairs with the same fullness of knowledge and a like distinction of style. The volume before us[1] deals with the problems of nationality that arose in the development of the British Commonwealth of Nations during the formative period, 1918 to 1936. A second volume is to deal with economic problems and relations during that period. To the present volume there is attached a legal chapter by R. T. E. Latham, which is a masterly study of the development of law in the Commonwealth, comprising (1) the expansion of the Common law, (2) the unity in the law of the British Commonwealth of Nations and the function of the Judicial Committee of the Privy Council in the development of that unity, and, lastly, (3) the nature and the future of the Commonwealth legal obligations.

Both the political study of Professor Hancock and the legal study of Mr. Latham are as thorough and objective as studies of contemporary history can be. The two writers hail from a self-governing Dominion, and each brings an independent mind to bear on the past history and present relations of the British Commonwealth. In their freshness of approach and their lucidity, and frequent brilliance, of writing they suggest that the vast spaces of the Dominions nourish a mental quality that will be a most valuable stimulus in the universities of the mother country.

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[1] *Survey of British Commonwealth Affairs.* Vol. 1: "Problems of Nationality, 1918–1936." By W. K. Hancock. (London: Humphrey Milford, Oxford University Press, 1937.) Pp. 673. 25*s.*

Professor Hancock traces in detail the development of the idea of equal status of the self-governing Dominions through the Imperial Conferences and the Peace Conference until its final legal embodiment in the Statute of Westminster. He shows the effectiveness of that new status in relations within the Commonwealth, but remarks that in international relations stature counts for more than status. He examines critically but sympathetically the movement for according Dominion status to India, and shows how incidents like Amritsar or the treatment of the Indian settlers in Kenya militate against any feeling of equality amongst the Indians. He will not let rhetoric slur over certain persistent difficulties which arise about the equal status of the members of the Commonwealth who are "freely associated without any compulsion whatsoever." These difficulties are particularly acute with regard to the Irish Free State; and Professor Hancock gives an illuminating account of the chequered relations of the Free State with the Crown, omitting nothing and setting down naught in malice, but emphasizing the historical causes which have gone to create the difficulties.

He is not content with a thorough survey of the inter-Commonwealth relations of the self-governing Dominions in the stricter sense of the term. He examines with the same thoroughness the Imperial problems that have arisen in Ceylon, Newfoundland, Malta and, most recently of all, in Palestine. In these four cases he sees examples of "the administration of the medicine of the body politic"; in two cases with apparent success, in the other two with results which are still ambiguous. He does not, indeed, propound a solution for the last and most thorny problem of Palestine, but he does make clear the failure of the British Government to define a clear policy in the first place, and, when it has defined a policy, to carry it out with resolution. It adds vividness and freshness to the historical survey that the writer has visited several of the Dominions and Colonies whose problems he examines, so that, while he observes an almost pedantic citation of documents, the narrative is not bookish but has a breath of reality.

In spite of his critical standpoint he concludes with a note of optimism, hopeful that the genius of the British peoples will reconcile the two principles of liberty and unity through the free association of peoples. The way in which the constitutional crisis caused by the abdication of Edward VIII was surmounted last year illustrated the successful working, in the spirit, of the Statute of Westminster. It is of good augury for the building up within the Commonwealth of the same kind of practical development as problems arise that has marked the development of the British Constitution. It is well remarked in the concluding legal essay that the Commonwealth is a "lawless association," of which the Statute of Westminster is the only legal document. That capacity for compromise, for avoiding the finite and eschewing logic, which has made England great, may preserve the unity and co-operation of the Commonwealth of British nations.

One criticism may be passed, that occasionally the treatment seems slightly long. It is a work " of long breath " all the time ; and now and then one wishes that the author would drive us at a greater pace through a stretch of level country. But it would be unfair and ungracious to end on a cavil a review of a book which is so comprehensive, which breaks so much new ground and which is written with such fairness and vivacity.

N. B.

CABINET GOVERNMENT.

ALTHOUGH Dr. Jennings presents an admirably comprehensive survey of the history of Cabinet Government [1] it is useful to have the work of his colleague at the London School of Economics, Mr. Smellie,[2] as a background. For example, his summary of the personnel enables an appreciation to be gained of the change which has taken place in the social status of the members of the Cabinet. " Russell's Cabinet of 1852 was called the Dukery. In the Cabinet of 1859, which included three dukes and the brother of a fourth, Gladstone, Milner Gibson and Cardwell were the only three men without titles." Mr. Smellie sums up that, in the period 1832 to 1867, " in the formation of Cabinets, as in the life of ancient China, the dead had more consideration than the living." He considers how far during those years was the English Cabinet system effective for the conduct of foreign relations, for the preservation of peace, and, when the need should arise, for success in war, and decides that it is impossible to give a final answer. Again, in the description of the difficult negotiations between the King, the Prime Minister and the Cabinet which led to the passing of the Parliament Act the narrative of Mr. Smellie makes a definite contribution to the detailed record of Dr. Jennings. Moreover, the larger canvas of Mr. Smellie enables him to give a definite place to the development of the Empire.

It is pardonable in these pages, though a little ungrateful, to express the hope that it might have been possible for Dr. Jennings to have annotated some of his important points with references to analogous difficulties in the Dominions. The Cabinet with the King and the Houses of Parliament are the instruments for carrying out the democratic principle upon which is founded the government of the British Empire. While the position of the King is maintained upon, and largely owes its strength to, this democratic basis, the Prime Minister in a minor degree has a relationship with all the Governments of the Empire, as he is in direct communication with the Prime Ministers of the Dominions and presides at Imperial Conferences. In the appointment of important representatives of the Crown circumstances may require the Prime Minister to consult the Cabinet. The principal occasions have been the appointment to the office of Viceroy of India, though in 1909 the appointment of Mr. Sinha to the Governor-General's Council was approved by the Cabinet. In Dominion affairs it is significant to observe that action which has had important effects has been taken without consultation with the Cabinet. Lord Milner's letter from South Africa, for example, in 1898 was circulated by Mr. Joseph Chamberlain, then Colonial Secretary, only to five principal members of the Cabinet and a reply sent without consulting the whole body. The secrecy of the proceedings of the Cabinet was guarded by a rule forbidding the taking of notes by any Minister other than the Prime Minister, though occasionally a formal minute was drafted on an important occasion. The result sometimes was uncertainty about a decision, and in 1900 the publication of the Spion Kop dispatches, through a misunderstanding, led Lord Salisbury to express a doubt whether " our traditional practice of not recording Cabinet decisions is a wise one." It was not, however, until 1916 that the deliberations were embodied in formal Cabinet minutes, known officially as " Conclusions." The war, by providing an exceptional amount of important work in this as in so many other matters, had an indirect effect. Its direct influence upon Cabinet procedure found expression in the War Cabinet, of which the sittings were enlarged both in 1917 and in 1918 by the attendance of Dominion ministers. During the war also the Committee of Imperial Defence, which had been originally formally constituted in 1904, received increased powers through which the action and policy of the British Government were co-ordinated with those of the Governments of the Dominions and representatives of the Dominions are summoned when the business of a meeting affects the Dominions.

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[1] *Cabinet Government.* By W. Ivor Jennings. (London : Cambridge University Press.) Pp. xii + 484. 21*s.*

[2] *A Hundred Years of English Government.* By K. B. Smellie. (London : Duckworth & Co., Ltd.) Pp. 468. 15*s.*

To what extent the Cabinet is entitled to act without consultation beforehand with the Sovereign has been illustrated in Dominion affairs. In 1904 the King objected that the Colonial Office had abolished Chinese labour without laying any dispatch before him upon such an important matter of policy, and in 1906 he insisted that the Colonial Secretary should be summoned to the Privy Council in order that a Transvaal Order in Council should be explained to him. It is generally recognized, as laid down by the Imperial Conference in 1926, that the Governor-General of a Dominion holds " in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain." It is maintained according to a learned contribution by Mr. Mandelbrote to the *South African Law Journal*[1] by the Union's Status Act of which s. 4, according to General Smuts and other authorities, implies that the King or Governor-General has a discretion in regard to the appointment and dismissal of ministers and the dissolution of Parliament provided that in its exercise accepted constitutional conventions will be followed. It is observed that in South Africa " there has been no overt disagreement between the Governor-General and the Ministry." In 1932 the Governor of New

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[1] November, 1936.

South Wales dismissed the Prime Minister. The difference of opinion about his action seems to turn rather upon the suitability of this remedy for the wrong committed by the Prime Minister in violating the law than the inherent right of the Governor to dismiss him. Dr. Jennings cites an earlier precedent in 1879, when the Lieutenant-Governor of Quebec dismissed the Prime Minister. Allied with this right is the question in what circumstances may the King or Governor-General refuse to grant a dissolution of Parliament? This appears to be one of the cases in which there has been some difference of practice in the United Kingdom and the Dominions. On several occasions the prerogative has been exercised in the Commonwealth of Australia. Canada also provided an example in 1926, when the Governor-General refused a dissolution. The position in this and other matters shows that there is a definite practical value in a study of the subject including the Dominions.

Dr. Jennings' volume was published while King Edward VIII was still reigning, so that an article by Mr. Weidenbaum in the *New York University Law Quarterly Review*[1] is an interesting footnote. Dealing with the extent to which the King is bound by his Cabinet's advice, he maintains that not only his public life but also such private activities as are deemed to be of public importance are subjected to his Cabinet's control. He cites as an example the choice of a holiday resort, in which he may have enjoyed perfect liberty. "But such practice," he submits, "cannot have the effect of creating a precedent, and a dangerous international situation may, in the Cabinet's opinion, render it undesirable to visit a certain locality." The position of the Cabinet as regards personal acts of the monarch and the events preceding the abdication is stated with admirable lucidity. The result is declared to have proved "the British Commonwealth of Nations to be united not only in their common allegiance to the Crown, but also in their endeavour to retain and maintain the Crown, as the symbol of and bond between its constituent members." The action of the Cabinet strengthened the position of the Crown not only in Great Britain but throughout the Empire.

C. E. A. B.

CIVIL AVIATION AND THE LAW.

Mr. Moller may be congratulated on having begun the cultivation of almost virgin ground. At a time when aerial transport was more or less in its infancy the late Professor Pearce Higgins and Professor Hazeltine wrote and lectured on this theme, the International Law Association and the Comité Juridique Aérien produced interesting draft codes of aerial law and the present reviewer may be forgiven for referring to a paper on the subject which he read to the Grotius Society in 1922 envisaging the aerial developments that might affect the lives of all.

Since then life in the air has proceeded apace, so that the courts may soon have to solve many legal problems arising out of human flight and aerial transport. Since Professor Arnold McNair's *Law of the Air*, published in 1932, in which he reviewed the subject in a masterly fashion, there have been further developments, so various and important that one welcomes Mr. Moller's work [1] as the latest and most practical and comprehensive textbook on the law of civil aviation.

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[1] March 1937.

Part I of the book is in the main historical, tracing the ground which has been covered before and since the Paris International Convention of 1919 to regulate aerial navigation both in this country and abroad. All the post-war statutes and orders and regulations, including the Air Navigation Act, 1936, as well as the principal international conventions, are usefully set out as appendices.

Part II of the work will be invaluable to the practitioner, embracing as it does so many active problems of to-day when flying impinges more and more on private rights. The Act of 1936, for instance, introduced provisions for compulsory insurance in respect of aircraft similar to those found in the Road Traffic Acts of 1930 and 1934. There have been so far very few cases in England decided in this new branch of jurisprudence, but wherever it has been feasible to draw on analogies from shipping, Admiralty and mercantile law Mr. Moller has done it with conspicuous success.

Looked at, moreover, as a contribution to the literature of international law, this work is most valuable in pointing out how far the most important countries have gone to achieve the ideal of a uniform code of international aerial transport. W. L.

LAW AND AUTHORITY IN A NIGERIAN TRIBE.[2]

UNDER "indirect rule," the term given to the system of government in Nigeria and certain other colonies, the customary law is given statutory recognition and applied by native courts established under warrant. The administrative officer supervises the working of these courts, hears appeals, and takes the more serious cases. In the absence of a written law, it is a difficult undertaking to ascertain what is the law applicable to any given case, more especially as the native population is divided into a variety of subdivisions, each with its own language and custom. The investigation is almost invariably carried out in the course of routine work by administrative officers who have had no special training in jurisprudence or sociology, and whose facilities for acquiring a knowledge of native society are limited by frequent transfers and absence on leave. The British have formulated the modern theory of indirect rule and raised it to the status of a philosophy of government, but there are very few systematic studies of primitive law in English. It is perhaps significant that this volume of Dr. Meek's is an indirect outcome of the Aba women's riots of 1929 in South-eastern Nigeria, which emphasized shortcomings in the method of administration and stimulated the government to embark upon a search for traditional native authorities. The author, then anthropological officer for the Northern Provinces, came down to advise and conduct independent investigations. This account of Ibo law is based on material collected during nine months spent in the field.

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[1] *The Law of Civil Aviation*. By N. H. Moller, M.A., LL.M., Barrister-at-Law. (London: Sweet & Maxwell, Ltd.) Pp. xxxi + 550. £1 5*s*. net.

[2] By C. K. Meek, M.A., D.Sc. Oxon. (London: Humphrey Milford, Oxford. University Press. 1937): Pp. xvi + 372. 17*s*. 6*d*.

The book is one of the rare works that go beyond the formal definition of rules to analyse the complex of forces that make men obey the law. As punishment by a court is only one of numerous sanctions in tribal society, and, no doubt, also in the modern state, Dr. Meek's approach has yielded a full account of the major institutions of the Ibo. Political, territorial and kinship organizations, the law of marriage and inheritance, and the administration of law are on the whole adequately described. The jurist may feel, however, that the author has not altogether escaped the danger, which he refers to in the introduction, of obscuring general principles by a mass of detail; there is a tendency to follow the old anthropological method of describing innumerable practices and observances without explaining their significance and relation to the problem of what the law is and how it works. A closer examination of court procedure would have been welcome, particularly as native tribunals are now incorporated in the system of administration and will have to develop new rules of procedure and evidence. A neglected question of primitive law is the degree to which magico-religious beliefs and ritual secure conformity to rules; it has a special significance in West Africa, where secret societies exercise a strong influence in many communities. Two chapters deal with the structure and practice of these societies, and the system of magic and witchcraft, but their bearing upon the various social and economic activities is not clearly defined.

The work is not intended to be a textbook on native law, yet the reader is reminded of the caution *omnis definitio in jure civili periculosa est*, and feels that the closer collaboration between the anthropologist and the jurist foreshadowed at The Hague in August is long overdue. Anthropologists, in searching for a definition of law that would distinguish it from positive morality, but not deny its existence in primitive society, are covering ground explored by jurists from Plato, Ulpian and Julian to Savigny, Austin and Maine. The jurist has the opportunity to observe and assist in the evolution and modification of customary law, a process he has hitherto only studied in historical retrospective as a feature of Roman law. There is practical need of some urgency for placing the investigation of customary law upon a systematic basis; as Dr. Meek and other workers have shown, African society is undergoing a rapid process of change, affecting land tenure, kinship, marriage and the corresponding background of ideas. The law must accordingly be modified, re-created to fit new conditions. The task falls primarily upon the courts, but they lack the perspective and purpose that theoretical studies alone can provide. The value of Dr. Meek's book is that it contains the indispensable yet rare material for such a study.

H. J. Simons.

PALESTINE.

ONE of the earliest legislative innovations of the Mandatory Government in Palestine was the introduction of English Company Law. The Companies Ordinance of 1921 and the Companies Winding-up Ordinance of 1922 were based upon the English Act of 1908, though in those early days of company development in Palestine it was not thought necessary to import the Act as a whole. Very rapidly, however, did this development proceed, and at the present day the number of registered companies is very large and their activities of great importance. The Companies Ordinance of 1929, which superseded the earlier Ordinances and their amendments, adopts most of the changes made by the English Act of 1928 and closely corresponds throughout to the English Act of 1929, though, in fact, it was the 1928 Act rather than that of 1929 which served as its model. It in turn has been amended, the most recent and important amendment being that made by an Ordinance of 1936 which introduced the private company into Palestine.

Mr. Kantrovitch, the Registrar of Companies, and his coadjutor Mr. Baker have rendered a great service to the profession by collecting in one convenient volume[1] the body of existing Ordinances, Schedules and Forms, together with useful Tables showing the correspondence with the English originals, section by section. To practitioners in Palestine this compilation will be essential. The number of English lawyers who have contact with Palestinian companies is rapidly increasing, and to them also the book will prove of great assistance; closely as the two bodies of law correspond, yet differences remain, and it is precise knowledge of these that the English lawyer requires when called upon to advise as to the Palestine Company Law. F. M. G.

THE PALESTINE MANDATE.

DR. FEINBERG is an acute lawyer and he examines the documents which concern the Mandate for Palestine, as also the Mandate itself, from a legalistic point of view and with much acumen.[2] Adopting Dr. Feinberg's point of view, we are led to conclusions which are interesting and sometimes startling. All States, Members of the League, are, we find, under a legal obligation to secure the establishment of a National Home for the Jews in Palestine, and in particular to facilitate Jewish emigration to that country. Again, every such State is entitled to hale the Mandatory Power before the International Court whenever any provision of the Mandate relating to the Jewish National Home has been disregarded by it (p. 101). Note further, that in the event of an advisory opinion being required from the Court with reference to Palestine, the Jewish Agency would be in a position to appear before the Court alongside the Mandatory Power (p. 106).

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[1] *Palestine Company Practice.* By Henry Kantrovitch and Henry E. Baker, M.A., B.C.L. (Jerusalem: Achiasaf and Greengras, 1937.) Pp. 599.

[2] *Some Problems of the Palestine Mandate.* Dr. Nathan Feinberg. (Tel Aviv, 1936.) Pp. 135. 250 mils.

At the present moment action with regard to Palestine is more likely to be dominated by political than by juridical considerations. But Dr. Feinberg is entitled to insist upon his legal points though the international lawyer to-day is but a voice crying in a wilderness. A point which he makes and which is new to the reviewer is the reference to the Emir Feisal's declaration to the Supreme Council of the Peace Conference, February 6, 1919. Speaking as Chief of the Hedjaz delegation, he said: "On account of its universal character, I shall leave Palestine on one side for the mutual consideration of all parties interested. *With this exception*, I ask for the independence of the Arabic areas enumerated in the Memorandum."

F. M. G.

INTERNATIONAL LAW IN INDIA.

THIS work [1] is of interest as a sign of the growth of Indian international consciousness as a result of the reforms. Allahabad has led the way by requiring knowledge of international law for the LL.B. degree, and a branch of the Royal Institute of International Affairs has been set up at Delhi. Though for the time being the British Government remains in final control of India's foreign relations, increasing association of the Indian legislature with the conduct of foreign affairs is envisaged. It is, therefore, appropriate that the main principles of the law of nations should be presented in a form adapted to the needs of Indian students and politicians. Mr. Sastri has studied carefully the recent literature, has chosen apt illustrations, and adopted clear formulations of current doctrines; nor have the mishaps of the League deprived him of confidence in the future of international law. He has with natural patriotism insisted that India knew the beginnings of international law, but it is perhaps going too far to claim that she had the conception of neutrality (pp. 355–8); the *udāsīna* is simply a person without desire to aid either of two contending sides; no theory is developed of neutral rights or duties. The distinct international status of the Dominions (p. 39) has now been asserted most clearly by the Irish Free State and the Union of South Africa through omitting the British Government as an intermediary in treaty negotiation. It is perhaps hardly fair to bracket the German termination of the Rhineland clauses of the Treaty of Versailles with the Turkish request for the modification of the regime of the Straits. The Turkish Government accepted as definitive the principle that it must be released from the terms of Lausanne by the accord of the powers; Herr Hitler insisted that release from Versailles must be accomplished by the fiat of Germany herself. In a new edition a full index should be provided, and, if Kauṭilya is ascribed to the fourth century A.D., he cannot be described as the minister of Candragupta Maurya (p. 287).

A. B. K.

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[1] *International Law*. By K. R. R. Sastry. (Kitabistan, Allahabad, 1937.) Pp. xxxi + 472. 7*s*. 6*d*.

BELLI'S *DE RE MILITARI ET BELLO TRACTATUS.*

THE Carnegie Endowment for International Peace is to be congratulated on the publication, in such a convenient form, of the original Latin text of 1563 [1]—which was practically inaccessible—accompanied by a competent English translation. As is well known, Belli was induced to write this treatise by humanitarian feelings, which included a desire not only that wars should be rendered less frequent, but that a check should be imposed on the military captains of his period, who were in the habit of conducting their wars with extreme rapine and lawlessness. The chief merit of this work consists, from the historical point of view, in the exhaustive review, given by Belli, of the doctrines on warfare prevalent during his times, many of which are now obsolete.

Professor Cavaglieri, who supplies an admirable Introduction to this edition, assigns Belli a notable place amongst the earlier writers on international law, and as a precursor of the fundamental principles upon which Grotius was, later on, to base his famous treatise on the *De jure belli ac pacis.*

C. J. C.

ELEMENTS OF INTERNATIONAL LAW.

THIS is a literal reproduction[2] of the famous edition of 1866 by Richard Henry Dana, which is reproduced with Dana's notes and with such explanatory notes and verbal corrections as Professor George Graften Wilson, the editor of the present volume, has deemed necessary. A useful chronological list is also given of the numerous editions and translations of " Wheaton's Elements."

Hitherto this series has been concerned with writers of not later date than the eighteenth century. The present volume brings us to the eve of contemporary doctrine and gives us (at a very low price) a fine exposition of the law and practice of the nineteenth century. The selection of Wheaton as one of the classical writers on international law is just ; and Professor Wilson's remark that " Wheaton may be named with Grotius " is true in more senses than one. Wheaton was in the Grotian tradition. Whilst attaching great importance to the practice of states (what writers have been more painstaking in their exposition of it ?) Wheaton also recognized the dynamic element contributed by natural law. His enumeration of sources points to the breadth of his juristic outlook and to his unwillingness to become involved in a purely doctrinal partisanship. His definition of international law (" those Rules of conduct which reason deduces as consonant to justice from the nature of the society existing among the independent nations with such definitions and modifications as may be established by general consent ") indicates sufficiently his attitude towards Positivism and Naturalism respectively. These qualities, together with the merits of his style and method, have continued to commend his work to students and practitioners of international law. The first edition of Wheaton appeared in 1836. The present volume, in ranking Wheaton as a classic, has merely articulated the international opinion of more than a century, as evidenced by the prestige of his work before international tribunals and in the utterances of statesmen. The value to legal science of such a reproduction is obvious. No writer has so completely and yet so concisely stated the law and practice of his period. His work is not only the starting-point for the study of Anglo-American doctrine; it is also a "fundamental work" of the highest order. Although Wheaton's life and his qualifications for writing his work are admirably sketched in Dana's Preface (which is reproduced in the present volume) we may regret the editor's decision to postpone "a more extended life of Wheaton" than appears in the Introduction to this volume until Wheaton's *History of the Law of Nations* is published in the same series. As might be expected, the production of the volume is excellent.

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[1] (London : Humphrey Milford, Oxford University Press, 1936.) 30*s*.

[2] *Elements of International Law.* By Henry Wheaton. No. 19 of the Classics of International Law published by the Carnegie Endowment for International Peace. (London : Humphrey Milford, Oxford University Press, 1937.) Pp. xliv + 642. £1.

J. MERVYN JONES.

NEUTRALITY.

THE question of neutrality appears as important to-day as in the past, and the conviction may be harboured that in spite of the opinions expressed by several publicists since the end of the Great War, it is far from extinct. The League of Nations has, in fact, failed either to put an end to war or to do away with the old conception of neutrality, which remains now, and will presumably continue to remain in future, a legal institution calling for practical examination and study.

This work,[1] which is very carefully and clearly written, was planned and directed by a Committee of the Columbia University Faculty, and its contributors include Professor Philip Jessup, Francis Déak, W. Alison Phillips, Arthur H. Reeve and Professor Edgar Turlington.

The first and second volumes examine the historical origins of war and bring out in a clear light the motives—mostly political and economical—which governed the early development of the rules of neutrality both at sea and land. It is apparent that the information given in these volumes on what may be called "the formative period of neutrality" necessitated considerable research in the public archives of the principal maritime Powers. This information shows, at the same time, that the rules on neutral rights were apt to undergo a severe strain whenever a great maritime Power was a belligerent. To take, *e.g.* contraband, it can safely be said that by the end of the seventeenth century no general consent existed on the general principles which should govern this law. Zouch reports Queen Elizabeth's speech in 1597 to the Polish Ambassador, which is characteristic of the legal conceptions prevailing at the time that *all* goods going to the enemy should be regarded as contraband:

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[1] *Neutrality: Its History, Economics and Law.* In four volumes. (New York: Columbia University Press; London: Humphrey Milford, 1935–6.) Vols 1, 2 and 3, 18*s.* 6*d.* each; Vol. 4, 14*s.*

> You speak of the Law of Nations; but you ought to know that when kings are at war it is lawful for one side to intercept reinforcements or supplies sent to the other, and to see that no harm comes to them from that source. This, we maintain, is agreeable both to the Law of Nature and to the Law of Nations, and it has been the practice not only of ourselves, but also of the kings of Poland and Sweden in their wars with the Muscovites.

Sir Leoline Jenkins, nearly 100 years later, was of the opinion that contraband could only be determined in three ways: by treaty, by the general law of nations or by belligerent proclamation. The confusion then prevailing should be ascribed in great part to the action of privateers, on whom great reliance was placed for the purpose of preventing supplies to the enemy, but to whom the profit motive was, in many cases, stronger than their patriotism or their regard for legal principles. The case of the Prussian ship *De Klein David* in 1748 is a typical example of the methods adopted by privateers to stultify the rule relating to the evidence to be derived from the ship's papers. She was first visited by a privateer who seized all her papers, but released her. Shortly afterwards, a second privateer seized and confiscated this neutral merchantman on the ground that she had no papers on board.

Even such limited rules as enjoyed an historical background of well over two centuries were severely shaken during the French Revolution and the Napoleonic wars, and it is noteworthy that the war then waged by Great Britain, frequently in alliance with other Powers, was influenced not only by the instinct of self-preservation, but also by the belief that it was her duty to champion neutral rights against their complete violation by the Napoleonic Orders in Council.

As distinct from contraband, prize courts had definite and fixed rules of procedure as early as the sixteenth century, and this was no doubt due to a series of brilliant Admiralty judges, who presided over the English Prize Courts, and who were able to lay down many of the principles which are still followed by the great maritime Powers.

The period which elapsed between the close of the Napoleonic war and the Great War did not greatly affect the rules of war, except that neutral rights received a further protection in the Declaration of Paris.

On the basis that the world is now sufficiently removed from the war years to be able to examine without passion and prejudice the question of neutrality, the third volume analyses in detail the incidents of the Great War period (1914–18). The German interferences with neutral trade, more particularly in relation to their economic results, are clearly set out. On the other hand, the volume gives outstanding instances of the new forms of interference adopted by the Allied Governments, such as "bunker control" and rationing agreements, blacklisting and the refusal of supplies of fuel to neutrals, except under conditions strictly imposed by the belligerents.

Despite American official protest against these interferences, the United States as a belligerent brushed aside the objections contained in its note of July 26, 1916, that the British condemned "without hearing, without notice and in advance."[1]

In a long memorandum which furnishes the best evidence of the attitude of the United States, Mr. Leslie Woolsey, the then Law Adviser for the Department of State, clarified the American position: The United States might participate in the rationing of neutrals "not to assist in the blockade of neutral countries," but to conserve its own supplies, to prevent persons in its territory from trading with the enemy, and to conserve tonnage for the transportation of military necessities.[2]

But whatever the legal basis for the economic policy might be, the result on neutrals was the same. In taking full advantage of the neutral economic dependence on American supplies, the United States Government not only prevented trade with the enemy, but obliged neutrals to charter a portion of their tonnage to the Allies and to refrain from laying up their vessels. The justification for these measures was based by the Allied Governments not only on belligerent interests and sovereign right, but on broad grounds of public utility.

This review of the economic consequences of belligerent interference with neutral rights is supplemented by accurate and detailed data as to the profits and losses sustained by each of the principal neutrals, and the conclusion is arrived at that a war of such great magnitude inevitably brings in its train a series of economic and financial dislocations so injurious to the world as a whole that no amount of neutral prosperity suffices to offset them. The legal aspect, however, receives very scant treatment in this volume.

The fourth volume, which was written entirely by Professor Jessup, contains an admirable analysis of the preceding three volumes and an exhaustive examination of the lessons to be drawn from the experiences of the past and their application to the problems of to-day and to-morrow. It is equally important in suggesting some new devices whereby the perpetual clash of interests between neutrals and belligerents might be adjusted.

The author is not, however, quite correct in stating that the Great War raised no fundamentally new principles. The extended use, for the first time, of aeroplanes, submarines, wireless and the consequent control of cables, and the censoring of commercial messages and communications, did, in fact, necessitate the laying down of novel principles unknown in previous wars. In his criticism of the Allied policy of deviation of ships into ports for visit, the author does not sufficiently take into account the fact that cargoes on ships are now so considerable and numerous that it is practically impossible to carry out a detailed search on the high seas.

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[1] *United States Foreign Relations*, 1916, Supplement, p. 422.

[2] *Ibid.*, 1917, Supplement 2, vol. ii, p. 865.

Professor Jessup does not view the establishment of the League of Nations as in any way affecting American neutrality as he states that

> The legal relations of neutrals being still unchanged for states not members of the League, it remains a major question of policy for the Government of the United States to decide whether it will take sides or whether it will maintain neutrality.

His opinion as to the effect of the Briand-Kellogg Pact is also far from encouraging:

> Under the Pact of Paris we have limited that freedom to the extent of agreeing not to resort to war "as an instrument of national policy." If any other state goes to war in violation of that treaty, we are free to join in warring against the treaty-breaker; we are under no legal duty to do so. Our policy will be dictated, as national policy always is, by our view of our own self-interest. Americans hope, and have reason to demand, that it will be an enlightened self-interest.

On the other hand, if the trend now suggested by the neutrality drafts before the United States Congress is embodied in permanent legislation, this will mean in many respects the abandonment of the historic rights which the United States has advocated and defended as a neutral nation, and there appears to exist no justification for such a reversal of American traditional policy.

The author is distinctly in favour of a policy of co-operation between all neutral Powers so that the burdens and hardships now falling on them during a war may be minimized through the "common use of economic means" directed against belligerents. Such a policy of co-operation has at various times been contemplated in the past, and was more recently envisaged in the Argentine Anti-war Treaty, to which the United States is a party. It becomes obvious, however, that this "use of economic means" will require international organization, which is now lacking outside the League of Nations. In conclusion, the view may be expressed that it is only when the great majority of nations are members of the League and willing to co-operate collectively against an aggressor that peace can safely be established. In such a contingency there will be no room for a policy of co-operation confined exclusively to neutral Powers.

C. J. Colombos.

INTERNATIONAL TRIBUNALS.

Those who have been accustomed to regard Mr. Ralston's convenient digest of the law and procedure of international tribunals published in 1926 as part of their regular apparatus will give a warm welcome to this Supplement,[1] which covers another ten years. That period has been one of great judicial and arbitral activity, and the value of Mr. Ralston's 1926 volume is greatly increased by this Supplement, which follows the same classification and bears the same marks of care and discrimination.

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[1] *Supplement to* 1926 *Revised Edition of the Law and Procedure of International Tribunals.* By Jackson H. Ralston. (Stanford University Press and Sir Humphrey Milford, Oxford University Press, 1936.) Pp. xx + 231. 18*s*.

ARNOLD D. McNAIR.

BIBLIOGRAPHIES OF FOREIGN LAW.

THIS well-documented volume[1] will prove an indispensable aid to all persons concerned with the laws of Costa Rica, Guatemala, Honduras, Nicaragua, Panama, and Salvador, whether as students of history or as practising lawyers. There is an Appendix on Central American Federations, including the First Federation 1824–38, the Second Federation 1896–8 and the Third Federation 1921–2. As will be observed, they have all been short-lived. The last of the three collapsed early in 1922 owing to the overthrow of the Herrera administration in Guatemala in December 1921.

A prefatory note states that the present compilation is a contribution to the programme of the Committee on Foreign Law of the Association of the Bar of the City of New York. By arrangement between this Committee and the American Foreign Law Association, the compilation is published as an item in the "Bibliographies of Foreign Law Series" of the latter Association.

R. W. L.

A GUIDE TO CURRENT LATIN-AMERICAN LITERATURE.

THE current literary production of Latin America is, in legal as in other fields, far too little known in Great Britain, and this handbook,[2] which is intended to be the first of a series of annual volumes, therefore merits inclusion in every legal reference library. The section of it devoted to legal literature and periodicals is the work of Mr. John T. Vance of the Library of Congress. It runs to 40 pages and lists over 500 items, classified by both subject and country. Judging from what the present reviewer saw and heard of current legal literature when visiting some of the countries concerned during the period covered by this volume, Mr. Vance's work is remarkably complete, but it would be helpful if in future volumes some fuller indication could be given of the content and quality of the books listed. Those responsible for the sections of this handbook devoted to other disciplines have commented more freely than Mr. Vance on the books which they have mentioned and, difficult as the task may be, it is perhaps permissible to hope that he will attempt to follow their example. It is eminently desirable that the legal literature of Latin America should be more widely known, but the English (and, one suspects, the United States) reader requires rather fuller guidance than Mr. Vance gives in this volume if he is to be encouraged not merely to consult highly specialized works when in search of specific information but also to acquire some general familiarity with the legal climate of Latin America. It would also be convenient if the content of the periodicals mentioned could be indicated rather more fully, *e.g.* the titles of leading articles might be given, at least in the case of the more important periodicals. Whether or not such improvements are possible, however, the American Council of Learned Societies has earned the very real gratitude of all students of comparative law by sponsoring this publication. C. W. JENKS.

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[1] *Guide to Law and Legal Literature of Central American Republics.* By Edward Schuster, Member of the Bars of New York and of the Federal District of Mexico, New York, 1937. (American Foreign Law Association. Bibliographies of Foreign Law Series, No. 11.) Pp. iii + 153. Price $2. (For sale by Foreign and International Book Co., 110 East 42nd Street, New York, U.S.A.)

[2] *Handbook of Latin-American Studies.* A Guide to the Material published in 1935 on Anthropology, Archæology, Economics, Geography, History, Law and Literature. By a number of Scholars. Edited by Lewis Hanke, Ph.D., Instructor in History, Harvard University. (London: Humphrey Milford, 1936.) Pp. xv + 250. *12s. 6d.*

THE GOLD CLAUSE.

DR. PLESCH continues his collection of material on the Gold Clause in this new edition of his second volume.[1] It contains cases down to the end of 1936 from the courts of ten countries. The judgments are printed, in English, without abridgment. There is a concise and able introduction.

Now that the House of Lords has reversed the Court of Appeal on the question of the proper law of Government foreign gold-clause loans (the Oslo Town Court having followed the Court of Appeal, in a case which Dr. Plesch reports) there will be further scope for Dr. Plesch's industry and discernment. It is to be hoped that a little more care will be exercised in the translation, which is often clumsy and occasionally unintelligible. Charming though it would be if Englishmen always referred to companies as " she," they do not, nevertheless. All the errors are, however, faults of expression in English, not faults in comprehension of the original. The publishers should look to the proof-reading, should remember that long lines are difficult to read, and above all that italics take three times longer to read than roman type. In a work such as this, intended for rapid reference by practitioners, an index is essential; but it has been again omitted. R. T. E. L.

We have also to acknowledge:[2]

Indian States in the Federation. By N. D. Varadachariar, B.A., B.L. (London: Humphrey Milford.) 5*s.*

Pitt Cobbett's Leading Cases on International Law. 5th Ed. Vol. II. *War and Neutrality.* (London: Sweet & Maxwell.) Pp. xxxix + 598. 25*s.*

The League of Nations and World Order. By Georg Schwarzenberger. (London: Constable & Co.) Pp. xvii + 191. 6*s.*

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[1] *The Gold Clause; A Collection of International Cases and Opinions.* Vol. II: " New Decisions of various Supreme Courts." 2nd ed. By Arpad Plesch, Dr. Jur., formerly of the Hungarian Bar. (London: Stevens & Sons, 1936.) Pp. viii + 106. 7*s.* 6*d.*

[2] Mention here does not preclude a review later.

Justice and Equity in the International Sphere. By Professors Bentwich, Bustamente, McLean, Radbruch and Smith. (London: Constable & Co.) Pp. x + 159. 4*s.* 6*d.*

The Commerce Clause under Marshall, Taney and Waite. By Felix Frankfurter. (London: Humphrey Milford.) Pp. 114. 4*s.* 6*d.*

Renvoi in Modern English Law. By A. Mendelssohn-Bartholdy; Ed. by G. C. Cheshire. (London: Humphrey Milford.) Pp. xiv + 87. 5*s.*

Legal Machinery for Peaceful Change. By Prof. Karl Strupp. (London: Constable & Co.) Pp. xxvi + 85. 4*s.* 6*d.*

Felony and Misdemeanour. Vol. I. By Julius Goebel, Jr. (London: Humphrey Milford.) Pp. xxix + 455. 21*s.*

Crown, People and Parliament. By William Edwards. (Bristol: J. W. Arrowsmith (London) Ltd.) Pp. 256. 8*s.* 6*d.*

Chatham House. By Commander Stephen King-Hall. (London: Humphrey Milford.) Pp. xii + 144. 5*s.*

The Sources of Modern International Law. By George A. Finch. (Washington, D.C.: Carnegie Endowment for International Peace.) Pp. ix + 124.

Salmond's Jurisprudence. 9th Edition by J. L. Parker. (Sweet & Maxwell.) Pp. xx + 753. 25*s.*

The Practice of the Privy Council in Judicial Matters. 3rd Ed. By Norman Bentwich. (London: Sweet & Maxwell.) Pp. xxiv + 353. 35*s.*

Henry Wheaton. By Elizabeth Feaster Baker. (London: Humphrey Milford.) Pp. x + 425. 18*s.*

The Legal Position of War: Changes in its Practice and Theory from Plato to Vattel. By William Ballis, Ph.D. (The Hague: Martinus Nijhoff.) Pp. xi + 188. Gld. 4.

Sur les Origines Etrangères de la plupart des Lois civiles russes. By Léon Baratz. (Paris: Rousseau & Cie.) Pp. 59. Frs. 10.

Grundlagen und Methoden internationaler Revision. By Werner Gramsch. (Stuttgart: Deutschen Verlags-Anstalt.) Pp. 181. RM. 6.

Gold- und Valutaklausel in deutscher und niederländischer Gerichtspraxis. By Dr. Sack and Dr. Meyer-Collings. (Munich: C. H. Bech'sche Verlagsbuchhandlung.) Pp. viii + 336. RM. 7.50.

Abhängige mitglieder Völkerrechtlicher Verbände. By Dr. jur. Friedrich Apelt. (Leipzig: Verlag Rudolf M. Rohrer.) Pp. 211. RM. 7.

Die Wandlungen in Chinesischen Verfassungsrecht seit dem Zusammenbruch der Mandschu-Dynastie. By Dr. jur. Hai-Chao Chiang. Pp. xiv + 306. RM. 22.

Die Lehre vom Primat des Völkerrechts in der neueren Literatur. By Walter Schiffer. (Vienna: Verlag Franz Denticke.) Pp. 286. M. 12.

Handbuch des internationalen Privatrechts unter besonderer Berücksichtigung der schweizerischen Gesetzgebung und Rechtssprechnung. By Dr. jur. Adolf F. Schnitzer. (Zurich: Verlag für Recht und Gesellschaft A.-G.) Pp. xvi + 415.

Der Gesichtspunkt der Public Policy im Englischen Recht. By Hans-Heinz Todsen. (Hamburg: Paul Evert Verlag.) Pp. 77.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Bombay Law Journal; Bombay Law Reporter; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Headway; Hindustan Review; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal du Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Revista de Ciencia Juridicas y Sociales; Revista de Derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; Social Sciences Quarterly; South African Law Journal; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences; Wisconsin Law Review; Zeitschrift für Ostrecht.